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THE

SOLICITORS' JOURNAL

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CURRENT TOPICS

Second in Line

GREAT was the welcome given to the arrival last Friday, 19th February, of the younger son of THE QUEEN and the DUKE OF EDINBURGH. The infant prince follows the PRINCE OF WALES in line of succession to the Throne. On Monday the House of Commons resolved that a congratulatory address be presented to Her Majesty assuring her of their unfeigned joy and satisfaction on the birth of a son. On Tuesday the Upper House similarly recorded their congratulations in an address which will assure Her Majesty that every addition to Her Majesty's happiness affords the highest satisfaction to the House of Lords. We respectfully add our felicitations and best wishes to those which are pouring into Buckingham Palace where The Queen was delivered of her youngest child. It is almost 103 years since a reigning British queen gave birth to a child; Princess Beatrice, later Princess Henry of Battenberg, youngest child of Queen Victoria, was born on 14th April, 1857. We had hoped to quote what we wrote upon that occasion; however, possibly because we ourselves were only three months old at the time, the event appears to have passed us by.

Treble Chance

MR. HINCHY has become unseated at the last hurdle on his hitherto successful run against the Inland Revenue Commissioners (*Inland Revenue Commissioners* v. *Hinchy* (1960), *The Times*, 19th February). By now readers will be familiar with the facts of the case: in his tax return for 1952–53 Mr. Hinchy had returned interest received from the Post Office Savings Bank as £18 when it was £51. Section 25 (3) of the Income Tax Act, 1952, defines the penalty for a taxpayer's non-delivery of a correct income tax return as "the sum of £20 and treble the tax which he ought to be charged." Accordingly the Revenue claimed a penalty of £20 plus three times Mr. Hinchy's total tax liability for the year in question; this amounted to £438. Both DIPLOCK, J., at first instance, and the Court of Appeal, ruled against the interpretation of s. 25 (3) which the Revenue sought. The House of Lords—before which Mr. Hinchy did not appear and was not represented—has now unanimously upheld that interpretation. Significantly, however, the LORD CHANCELLOR remarked that it would be wrong to ignore the underlying thought of the Court of Appeal that the penalty provisions in the 1952 Act produced minimum penalties which were wholly unrelated to the extent of the default and so extravagant as to be shocking in a penal provision. It is well known that, before the *Hinchy* case, the existence of the provision was used by the Revenue as a lever to effect

CONTENTS

settlements satisfactory to them. Since the *Hinchy* decisions against them negotiations for such settlements have been suspended. In view of the judicial criticisms of the penalty provisions, and the fact that the Revenue has invited various interested bodies to submit memoranda on them, no extra-sensory perception is required to forecast the inclusion of amendments to these provisions in an early, if not the next, Finance Bill. Meanwhile, any taxpayer so inclined had better pause to consider the outcome of the *Hinchy* case before deciding to take a chance.

Professional Prospects

THE statistics contained in the Report of the Royal Commission on Doctors' and Dentists' Remuneration (Cmnd. 939, H.M.S.O., 15s.) become more absorbing the more one studies them. We had a sneak preview of a small part of the picture in the annual report of the Council of The Law Society last year, and now we can see the picture as a whole. It seems that at most ages, at most levels and at most degrees of success solicitors earn more than accountants, architects, surveyors, engineers, university teachers, graduates in industry, dentists and some doctors, but less than barristers, actuaries and some other doctors. Probably the most revealing set of figures is that which contains the average earnings of professional men over a working life between the ages of thirty and sixty-five. The average solicitor earns £88,000 during that period, a figure exceeded only by consultants at £117,000, actuaries at £105,000, hospital doctors at £100,000 and barristers at £92,000. Naturally all these figures are subject to qualification. For example it is more profitable to be a "not very successful" solicitor aged between fifty-five and sixty-four earning £1,850 a year than a barrister of the same age and quality who earns only £680 a year. On the other hand, whereas there are only thirty-five solicitors per 1,000 who earn £6,000 a year or more, there are seventy-three barristers. A profession which seems to do consistently well is that of the actuary. A "not very successful" actuary does better than a similarly placed solicitor at all ages except one, while there are seventy-five actuaries per 1,000 with £6,000 a year or more. There are only twenty-five accountants per 1,000 in the same category. It is comforting to know that, however much we may envy salaried solicitors, the earnings of solicitors in private practice are generally higher, although the average amount of capital invested by each principal is £3,844. Incidentally it is more profitable to be a solicitor in England than in Scotland.

Signing a Will

SECTION 9 of the Wills Act, 1837, stipulates, *inter alia*, that no will shall be valid unless it shall be in writing and "signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction." When is a will "signed" for the purposes of this section? This question arose in a recent case in the High Court (*In the Estate of Cook* (1960), *The Times*, 20th February) where, instead of signing her name in the usual manner, the testator had written the words "Your loving Mother" at the end of her duly attested home-made will. COLLINGWOOD, J., held that the will had been "signed" by the testator and he applied the principle enunciated in *In the Goods of Sperling* (1863), 3 Sw. & Tr. 272. In that case a solicitor told one Saunders, who had been called to witness his master's will, "Now sign yourself here as servant to Mr. Sperling." Saunders wrote the words "Servant to Mr. Sperling" intending those words to be his signature and believing that it was the proper way of attesting the will. Sir J. P. Wilde thought that there was a sufficient attestation and subscription as he was satisfied that Saunders wrote the words intending thereby an identification of himself as the person attesting. Of course, this is not the first occasion on which the courts have held that something less than a signature, in the normal sense of the word, will satisfy this statutory requirement. A mark without the name of the testator (*In the Goods of Bryce* (1839), 2 Curt. 325), ink smeared on the testator's thumb with which he impressed a mark at the foot of the will form which he had purchased (*In the Estate of Finn* (1935), 105 L.J.P. 36), and an engraving of the testator's signature (*In the Goods of Jenkins; Jenkins* v. *Gaisford & Thring* (1863), 3 Sw. & Tr. 93), have all been held to be sufficient. The courts have also generously interpreted the requirement of a signature in relation to s. 40 (1) of the Law of Property Act, 1925: see, e.g., *Leeman* v. *Stocks* [1951] Ch. 941.

"Special Reasons" for Not Disqualifying

SECTION 15 (2) of the Road Traffic Act, 1930, stipulates that any person convicted of driving or attempting to drive a motor vehicle under the influence of drink or a drug shall, "unless the court for special reasons thinks fit to order otherwise," be disqualified for at least twelve months from holding or obtaining a licence. There have been many occasions on which the courts have had to decide whether, in a particular case, there are "special reasons" for not disqualifying a driver convicted of an offence under s. 15 of the 1930 Act and the point arose in a recent case at the Thames Magistrates' Court. An amateur wrestler pleaded guilty to a charge of driving under the influence of drink but contended that there were "special reasons" why he should not be disqualified. He said that he had been taking preludin tablets to reduce his weight and that he became "very ill" as a result of taking a glass of whisky and two tablets on the same day. It was, he maintained, the first time he had taken alcohol on the same day as he had taken tablets, but Mr. LEO GRADWELL, the magistrate, refused to hold that these facts disclosed "special reasons" for not ordering a disqualification. However, in *Chapman* v. *O'Hagan* (1949), 65 T.L.R. 657, the Divisional Court found that somewhat similar facts entitled the magistrates to find "special reasons." The defendant, a veterinary surgeon, was kicked in the leg by a horse and as the wound was inflamed and painful he took more than double the normal human dose of M. and B. 693 tablets and half a grain of pheno-barbitone after each dose of the M. and B. Not knowing that alcohol would have increased effect when taken after the drugs, the defendant consumed during the evening his normal moderate quantity of whisky and beer. This led to his conviction under s. 15 of the 1930 Act, but, after considerable hesitation and with some reluctance, their lordships held that in this borderline case there was evidence on which the justices could exercise their discretion not to disqualify the defendant for the "special reasons" that the drugs had rendered him more prone to the effects of alcohol and that he was unaware that they would have that effect. The Court of Criminal Appeal has found "special reasons" for not disqualifying a driver who was unaware that he was suffering from diabetes, a condition which gives alcohol increased effect (*R.* v. *Wickins* (1958), 42 Cr. App. R. 236).

OBTAINING A GRANT: WHAT WENT WRONG?—I

Is there a practitioner who has never had an application for a grant of probate or letters of administration at some time rejected by the probate registry officials? The issue of a grant has so many important consequences that of necessity each application is subjected to a strict check to ensure that every detail is in order. The purpose of this article is to deal very shortly with some of the general requirements for drafting the papers to lead to a grant with particular reference to those small items which can so easily go wrong and result in the application being "stopped."

In this part I propose to deal with the applicant for the grant. He is required to state in the oath his full name, address and description. These same particulars appear also in the Inland Revenue affidavit and the bond, if any, and are reproduced in the grant. It is important that the details should be the same wherever they appear in the papers and any discrepancy will usually result in the application being "stopped" to ascertain which of the variants is correct. As an example, double names often give trouble because of the incorrect insertion or omission of a hyphen between them. An error in the address or description may often be rectified by a certificate by the solicitor endorsed on the document, but an error in the name will usually have to be put right by alteration and re-swearing.

The applicant's name and identity

The grant issues to the applicant in his true name and this is the name which must be given in the oath. The true name is the name by which the applicant was registered at birth unless a subsequent change of name has taken place. A change of name is usually effected on marriage, by Royal Licence or deed poll, on becoming a peer, or by habit and repute. An alias will not be shown in the grant unless the applicant expressly asks for it and gives a sufficient reason for so doing. A change in the applicant's name, or a difference between his true name and the name by which he is described in the will, will often give rise to doubt as to whether he is in fact the person entitled to the grant and must be explained satisfactorily. The method of proving identity varies according to the extent of the difference in name. If slight, it is usually sufficient to add a short statement in the oath immediately after the true name of the applicant, viz., "in the will called —", or, if the discrepancy occurs in the appointment of executors and the name is correctly recited elsewhere, "in the appointment called —", or as appropriate. In other cases additional facts must be given, either as a further paragraph in the oath or in a separate affidavit sworn by the applicant or by some other person (see r. 5 (2), Non-Contentious Probate Rules, 1954). The usual method of establishing identity in some common cases is set out in the table which follows. Five different aspects are there considered in groups, namely, omission of names, reversal of names, names represented by initials, names mis-spelt, incomplete or incorrect description and change of name. The table (p. 154) can only be a general guide because the particular circumstances of the case may call for a stricter or less strict method of proof than that indicated therein. For instance, if the name of the applicant is one in very common use, it may not be sufficient to state in the oath "in the will called," etc., and strict proof of identity will have to be given. Whenever there is some doubt, it is always advisable to give the highest form of proof rather than to risk having the application "stopped" for further evidence.

Facts which may be adduced in strict proof of the applicant's identity are:—

(1) that he had been asked by the testator, and had agreed, to act as an executor;

(2) that he had been informed by the testator that he had been appointed an executor;

(3) that he was habitually known, in particular to the testator, by the names appearing in the will;

(4) that he was the only person bearing the names appearing in the will and living at the address given in the will at the date thereof;

(5) that he was the only child (or other relation) of the deceased bearing the names appearing in the will.

It is never sufficient to state merely that the applicant is the same person as the person named in the will.

If the applicant is described as "my wife" without being named, the oath should show that she was the lawful wife of the testator at the date of the will. An oath which omits this statement may be accepted if the applicant's solicitor can certify that he has inspected the certificate of marriage between the deceased and the applicant and that the date of the marriage was before the date of the will. Similarly, the appointment of "my son" without naming him requires that the applicant should swear that he was the only lawful son of the deceased at the date of the will.

If the testator has appointed a husband and wife as his executors, describing them as "Mr. and Mrs. J. G. Robinson," and the wife is proving the will, either alone or with her husband, the oath must show that she was the lawful wife of "John George Robinson" at the date of the will.

When the applicant is referred to in the will as being a blood relation of the deceased but he is related by marriage only, or is not related at all, proof must be given that the deceased was referring to the applicant. This may often be done by showing that the deceased never had a relation of that name and that he was in the habit of referring to the applicant as a relation. If, however, the deceased had a blood relation with the same name, then the latter is prima facie entitled to the grant but he may be cleared off by showing that to the knowledge of the testator he was dead at the date of the will, or by giving such other facts as would establish the identity of the applicant with the person named in the will.

Whenever the surnames of the applicant and the deceased might be expected to be the same but in fact they are not so, it is advisable to explain the reason for the difference. Thus, the relict of an intestate who has since remarried may be described as "Elizabeth Robinson, formerly Elizabeth Edwards, widow, but now the wife of John Robinson." If the applicant has acquired a different name by habit and repute, the circumstances under which the new name was assumed should be stated in the oath, viz.: "that I was formerly known as John Edwards but assumed the name of John Robinson in or about the month of ——, 19—, since when I have never used the name of John Edwards but have always been known as John Robinson."

When an executor is intending to renounce and the name by which he is referred to in the will differs from his true name, the difference should be explained by a statement in the form of renunciation supported by a corresponding statement in the oath of the applicant. There is no need for the renouncing executor to prove his identity by affidavit.

TABLE

	TRUE NAME	NAME IN WILL	PROOF
Omission of names			
(1) Christian name, or forename, not being the first name	John George Robinson	John Robinson	" in the will called "
(2) First name	John George Robinson	George Robinson	Strict proof
Reversal of names			
(1) First name different	John George Robinson	George John Robinson	Strict proof
(2) Middle names reversed	John George William Robinson	John William George Robinson	Strict proof, except possibly where relationship of applicant to deceased is shown
Names represented by initials			
(1) All names represented	John George Robinson	J. G. Robinson	No proof needed
(2) Name omitted, not being the first name	John George Robinson	J. Robinson	" in the will called "
(3) First name omitted	John George Robinson	G. Robinson	Strict proof
(4) Names reversed, first name different	John George Robinson	G. J. Robinson	Strict proof
(5) Middle names reversed	John George William Robinson	J. W. G. Robinson	Strict proof, except possibly where relationship of applicant to deceased is shown
Names mis-spelt			
(1) Christian name, or forename; similar sounding	Elizabeth Robins	Elisabeth Robins	" in the will called "
(2) Surname; similar sounding ..	Elizabeth Robinson	Elizabeth Robbinson	" in the will called "
(3) Similarity, but resulting in another name in common use	Elizabeth Smythe	Elizabeth Smith	Strict proof
(4) No similarity .. .. (*a*)	Elizabeth Robins	Elizabeth Robinson	Strict proof
(*b*)	John George Robinson	John Geoffrey Robinson	Strict proof
Incomplete or incorrect description			
(1) Surname only given	John George Robinson	Mr. (or Capt.) Robinson	Strict proof
(2) Relationship but no name given ..	Elizabeth Robinson	My wife	Strict proof
(3) Relationship and full Christian names, or forenames, given	Elizabeth Robinson	My wife Elizabeth	No proof needed
(4) Relationship, but not all Christian names, or forenames, given	Elizabeth Mary Robinson	My wife Elizabeth	" in the will called Elizabeth "
(5) Relationship, but first name omitted or different	Elizabeth Mary Robinson	(*a*) My wife Mary	Strict proof
		(*b*) My wife Phyllis	Strict proof
(6) Wrong relationship	John Robinson (related by marriage or not at all)	My nephew John	Strict proof
Change of name			
(1) By deed poll	John Robinson	John Edwards	" formerly John Edwards who changed his name by deed poll dated " (The deed poll should be produced.)
(2) By marriage	Elizabeth Robinson	Elizabeth Edwards	" formerly Elizabeth Edwards spinster "
(3) On becoming a peer	The Rt. Hon. John Baron Blank	John Blank	" formerly and in the will called John Blank "
(4) By habit and repute	John Robinson	John Edwards	Strict proof

The question of identity also arises when the testator has appointed as his executors the holder of a particular office or a firm of solicitors or some other kind of firm. Unless the will indicates otherwise, the holder of the office *at the date of the testator's death* or the individual members of the firm *at the date of the will* are alone the persons entitled to prove the will in these circumstances. The oath should show how the applicants are entitled to the grant, e.g. "that I was the Mother Superior of the —— Convent at the date of death of the said deceased and as such am the sole executrix named in the said will," or "that we were the only partners of the firm of —— & Co. at the date of the said will and as such are the executors, etc." The fact that a partner in the firm has since retired does not cancel his appointment as executor.

It sometimes happens that the court in some countries, for instance the Republic of Ireland and the United States of America, when issuing a grant of representation, refers to the middle name of the grantee and of the deceased by initials only. It is often overlooked in the course of making an application in this country that all the names of the applicant, and of the deceased, must be given in full.

The order in which the names of the applicants appear in the oath should follow the order of appointment of executors in the will or, if the applicants are not the executors, the order of their priority for the grant. That order is followed in the grant. No change will be made in the order unless all the applicants expressly consent thereto in writing, either by letter or certificate or by a statement in the oath. In this connection, a trust corporation which is joining in a grant with an individual but not as an executor will not be placed first in the grant except with the consent of all the applicants.

The applicant's address

The address of the applicant should be his residential address; in practice the professional address of a solicitor may be given but it should be given in full and not simply as of a particular town. When the actual residence cannot be given but an accommodation address only, the oath should contain a statement that no permanent or better address can be given. Alternatively, the solicitor for the applicant may certify to that effect on the reverse of the oath. When the actual residence of the applicant is such as would appear to be an accommodation address but in fact is his permanent residence, it is advisable to state in the oath that the address is the permanent residential address of the applicant. A member of the Forces should give his private address, except that, if he has none, he may give his rank, number, unit and station. If a husband and wife are joint deponents to the oath, it should be made quite clear, if appropriate, that they are both resident at the address stated; the recital "John George Robinson of —— and his wife Elizabeth Robinson" with nothing more should be avoided.

A former address of the applicant need not be recited in the oath unless it is required to establish his identity as indicated above.

The applicant's description

A male applicant should give his exact occupation. A person "of no occupation" should so state; the description "gentleman" or "of independent means" is not accepted. "Retired" is insufficient; the applicant should either state his last occupation qualified by the word "retired" or else say "of no occupation." "Clerk" is taken to mean "clerk in Holy Orders" and any other type of clerk should be more fully described, viz.: solicitor's clerk, commercial clerk, etc. The possession of a university degree or the membership of a learned body does not necessarily mean that the applicant follows the profession to which the degree or learned body is related and it is therefore insufficient unless the actual profession is given, viz.: "medical practitioner," not "M.D." A knight or peer should describe himself as such and need not give his occupation; a knight should state whether he is a baronet or knight bachelor or indicate the Order to which he belongs. Because a grant will not issue to an infant, an applicant who is a student should state also that he is of full age.

A female applicant should usually give her status, and not her occupation. A married woman may describe herself as such or as "the wife of John George Robinson." In the latter event it is not necessary to give the address or the occupation of the husband, nor should the name of the husband appear in such proximity to the applicant's address as to make it appear that the address given is his address only. The description "feme sole" is not accepted in the Probate Division, and a divorced woman should be described as a "single woman"; the words "formerly the wife of ——" should be added if there may be some doubt as to her identity. A female whose marriage has been annulled reverts to the status she had immediately before the ceremony of marriage took place. A female practising as a solicitor need not give her status but may instead give her profession, unless her status is material to the application for a grant. The wife of a knight is properly described as "Lady," unless she is entitled in her own right to a higher mode of address.

(To be continued) D. R. H.

SOCIETIES

The CENTRAL AND SOUTH MIDDLESEX LAW SOCIETY held its annual meeting at the Century Hotel on 10th February. Mr. J. A. S. Nicholls, a solicitor of Wembley, was elected president in succession to Mr. R. C. Garrod, of Harrow.

Other officers elected were: vice-presidents, Mr. R. C. Politeyan (Ealing) and Mr. J. E. Aylett (Uxbridge); hon. treasurer, Mr. R. G. Phillips (Harrow); hon. secretary, Mr. W. Gillham (Willesden); hon. assistant secretary, Mr. W. Crocker (Wembley); and hon. auditors, Mr. R. L. Bignell (Middlesex County Council) and Mr. M. B. Buck (Wembley). Membership of the society exceeds 200. Solicitors interested in joining should write to the hon. secretary, Mr. W. Gillham, 25 Station Road, Harlesden, N.W.10.

The UNITED LAW DEBATING SOCIETY announces the following programme for March: 7th March, Debate—"This House would rather spend money on railway modernisation than on road improvements"; 14th March, Hat Debate—The motions for debate and the names of speakers will be drawn from a hat at the meeting; 21st March, Visit of Brigadier A. H. Pepys, D.S.O. (secretary), and Mr. Nigel Laing of the British Field Sports Society; Debate—"This House approves of field sports"; and 28th March, Debate—"This House believes that the case of *Lang* v. *London Transport Executive* [1959] 1 W.L.R. 1168, was wrongly decided." All meetings are held in Gray's Inn Common Room at 7.15 p.m.

SOME PROBLEMS ON *VOLENTI*

THE so-called rescue cases are said to form an exception to the general rule that when a person consents to run the risks involved in a certain course of action, and injury results to the consenting party, the person causing the injury will not be saddled with responsibility. Before the well-known case of *Haynes* v. *Harwood & Son* [1935] 1 K.B. 146, the English courts had not been called upon to work out the limits of the rescue principle. In *Haynes* v. *Harwood & Son* the Court of Appeal held that, when a person goes to the rescue of some third party placed in a position of peril by a wrongful act of the defendant, the defence of *volenti non fit injuria* will not apply and the rescuer may recover for any damage he suffers. Greer, L.J., accepted the following statement of Professor Goodhart which had been drawn from a study of the American cases of rescue :—

> "The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty" (*Cambridge Law Journal*, vol. 5, p. 196).

A recent case

In the recent case of *Baker and Another* v. *T. E. Hopkins & Son, Ltd.* [1959] 1 W.L.R. 966, the Court of Appeal has been called upon once again to apply this principle. The facts of this case were that a firm of contractors, of which one, Hopkins, was a director, took on some work which involved the clearing of a well of water. A petrol pump was erected on a platform some distance down the well. The erection of this pump was undertaken by Hopkins with the assistance of two workmen employed by the firm. The working of this engine resulted in the concentration of carbon monoxide in the well. On a certain evening Hopkins noticed a haze of gas in the well and the following morning he instructed his workmen not to go down the well until he arrived. At the time of the erection of the pump Hopkins conducted an experiment to see if there was sufficient oxygen in the well by using a lighted candle. This test only showed whether oxygen was present and not whether there was a concentration of carbon monoxide. In fact the test in no way gave an indication that the well was a danger to the workmen. It should be pointed out that Hopkins was of the opinion that the test was adequate. Before Hopkins arrived on the day in question, first one workman and then the other went down the well and were overcome by fumes. A doctor, Dr. Baker, was called and warned of the dangers involved in going down the well. As lives were in danger he insisted on going down, but, before doing so, he took the precaution of attaching a rope to himself so that he could be pulled to the surface if necessary. By a cruel set of circumstances the rope was caught as the doctor was being brought to the surface, with the result that the doctor and the two workmen, one of whom was named Ward, were poisoned by the gas and died. Actions were commenced by the representatives of the deceased Ward and of Dr. Baker against the firm of contractors, T. E. Hopkins & Son, Ltd. It was held at first instance that the company had been in breach of their duty of care owed to both Ward and Dr. Baker, but that there had been contributory negligence on the part of Ward and 10 per cent. of the responsibility for the accident should be borne by him. The defendants appealed to the Court of Appeal, where the findings at first instance were affirmed.

Ward v. *Hopkins*

This appeal will be dealt with very briefly as the real interest lies in the case of Dr. Baker. To those without experience in industrial cases it may seem unjust that the employers in this case should have been held liable at all when the workmen had deliberately disobeyed the instructions of a director of the company. The duty owed to the workmen by the employers in the present case was to take reasonable care to provide for the well-being and safety of their workers so as to avoid exposing them to unnecessary risks. On the facts it was held that the company had not done sufficient to warn the workmen of the acute dangers involved. The Court of Appeal said that it would be hard to visualise the workmen going down the well at all if a warning had been given to them that their lives might be in danger. Hence, as adequate precautions had not been taken by the company, the action of the workmen should have been anticipated. In other words the action of the workmen was reasonably foreseeable. This decision was clearly in line with the vast amount of authority appertaining to this type of industrial situation.

Baker v. *Hopkins*

This case raises several interesting points which, unfortunately, the Court of Appeal were not called upon to decide. The case as presented to the court was dependent on the liability of the company to the workmen. As the company were held to have been negligent towards their workmen, the action by the representatives of Dr. Baker became a straightforward application of the rescue principle as laid down in *Haynes* v. *Harwood*.

In all these cases of rescue there are many ways in which the courts can approach the problem. In the case of *Baker* v. *Hopkins* it would seem that the court approached it in the following way.

Having defined the duty of care by adopting the famous dictum of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562, at p. 580, as follows :—

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question,"

the Court of Appeal held that the employing company ought to have had in contemplation a prospective rescuer when, through their negligence, Ward had been placed in a position of peril which demanded rescue. The court then went on to consider the question of whether the doctor had consented to the risks of dangers involved. This proposition the court dismissed by accepting Professor Goodhart's statement, *supra*. Having considered the question of *volenti*, the court went on to consider whether the act of the doctor could be classed as a *novus actus interveniens*, thus rendering the damage too remote. This, too, the court dismissed as they held that the act was reasonable and could have been foreseen by the company. The chain of causation was thus not broken. Now, if the court accept that the basis of negligence is reasonable foreseeability, as indeed the Court

of Appeal did in the present case, it is contended that only one question must be answered by the court. This all-important question is: was the action of the rescuer reasonably foreseeable? Whether the problem be approached from the point of view of remoteness of damage or from the concept of *volenti*, in the ultimate analysis the final question to be determined is as phrased above. Once it has been established that a duty of care exists and that there has been a breach of this duty it is irrelevant then to consider the question of *volenti*. As Asquith, J., said in *Dann* v. *Hamilton* [1939] 1 K.B. 509, at p. 512:—

> "As a matter of strict pleading it seems that the plea of *volenti* is a denial of any duty at all, and, therefore, of any breach of duty, and an admission of negligence cannot strictly be combined with the plea."

In other words, if negligence is established, *volenti* is immaterial; or if *volenti* is established, the party consenting has taken himself outside the duty of care and the party "causing" the damage cannot be said to have foreseen the consequences. The self-same argument holds when considering whether the act of the rescuer is a *novus actus interveniens*. If *volenti* is established, then the consenting act becomes a *novus actus interveniens* which cannot have been foreseen. On the other hand any act which is reasonably foreseeable cannot be too remote. The whole position is clearly stated by Professor Street:—

> "The 'defence' to negligence of assumption of risk is then merely a back-handed way of looking at breach of duty . . . It will now be plain why the courts themselves so often seem either to be making the same inquiry twice (in examining breach of duty and *volenti non fit injuria*) or to indulge in verbal confusions of breach of duty, *volenti* and remoteness—they are in fact looking at the same issue from different standpoints" (The Law of Torts, 2nd ed., p. 163).

It can be argued that to state such propositions is to confuse the question of remoteness with the existence of the duty of care. This is not tenable since the duty of care itself is defined in terms of reasonable foreseeability; then anything which is reasonably foreseeable is not too remote. It is only in the extreme case of damage which is not reasonably foreseeable but is, nevertheless, a direct physical consequence of the wrongful act that the two concepts should be carefully distinguished. It can, therefore, be seen that whichever way the case of Dr. Baker is approached only one question has, in effect, to be answered by the court and that is, whether his act ought to have been anticipated by the company. In determining this point the court must examine the doctor's conduct, but this should not be an excuse for dividing the problem up into three distinct parts, thus giving the impression that different principles apply to each part. This was the attitude of the Court of Appeal in the present case, which does nothing but add confusion.

If the court had held that the workmen had been responsible for their own downfall, the problem would have been one of great complexity. In order for the representatives of Dr. Baker to have succeeded they could have sued the representatives of the deceased workmen. This would have produced a case novel to the English courts. In *Haynes* v. *Harwood* the court was only concerned with the rescue of some third party from the negligence of the defendant. In this novel case the court would have been concerned with the rescue of the negligent party from his own negligence. Winfield has suggested that there should be no difference in the approach of the courts (The Law of Torts, 6th ed., p. 45).

The approach outlined by Winfield is based on straightforward principles of negligence. If the negligent party could have foreseen the action of his rescuer, then a duty of care will be established. This is the approach adopted by Barry, J., in the court of first instance in *Baker* v. *T. E. Hopkins & Son, Ltd.* [1958] 1 W.L.R. 993, at p. 1004:—

> "Although no one owes a duty to anyone else to preserve his own safety, yet if, by his own carelessness, a man puts himself into a position of peril of a kind that invites rescue, he would in law be liable for any injury caused to someone whom he ought to have foreseen would attempt to come to his aid."

(Barry, J., did not follow a Canadian decision on the point, namely, *Dupius* v. *New Regina Trading Co., Ltd.* (1943), 4 Dom. L.R. 275.)

It should be pointed out that this statement is nothing more than an obiter dictum as it had been held that the company had in fact been negligent towards their workmen. It would seem that if this dictum of Barry, J., were accepted in the law, a completely new class of rescue cases would emerge. Considering the adverse criticism which has been levelled against the decision of *Haynes* v. *Harwood*, it would be very surprising if this new proposition, as it stands, were accepted. *Haynes* v. *Harwood* introduced a completely new principle into the law. The English law was stretched to the limit prior to this case, in *Brandon* v. *Osborne Garrett & Co.* [1924] 1 K.B. 548. In that case the plaintiff tried to pull her husband away from some falling glass, with the result that she herself was injured. Swift, J., held that she could recover from the negligent party who was responsible for the fall of glass. The decision was based mainly on the dilemma principle, that is, where a party chose a course of action in the agony of the moment brought about by the defendant's wrongful act, and so suffered damage, the defendant would be liable to him. Before *Haynes* v. *Harwood* there were many dicta to the effect that the "cool and calm" rescuer could not recover (see Scrutton, L.J., in *Cutler* v. *United Dairies (London), Ltd.* [1933] 2 K.B. 297). Although *Haynes* v. *Harwood* has enlarged the law to a considerable extent it is doubtful whether the courts would extend it as far as Barry, J., had in mind. The implications of his dictum are quite immense. It would seem that whenever a person engages in a course of conduct which could be classed as dangerous, then the prospective rescuer ought to be in the mind of the party so embarking. Take for example the swimmer who goes for a swim in rough weather; if a rescuer is injured in an attempted rescue, then on this principle the rescuer ought to recover. So much will, of course, depend on the facts of the case. Was the party inviting rescue himself aware of the dangers involved? Was he an expert or an amateur and is it customary for rescues to take place in such circumstances? These are some of the facts which a court should take into consideration in determining whether the act of rescue ought to have been contemplated. It is suggested that before the courts enlarge the rescue principle, cogent evidence should be available that the person creating the situation demanding rescue was fully aware of the dangers involved; otherwise, whenever a slightly dangerous course of action is taken, a duty of care will be owed to any prospective rescuer even where the possibility of being rescued never occurred to the embarking party. The law will impute such foresight to him. In order that this point should be clear two examples will be considered. An amateur climber embarks on a climb which to the amateur appears to be fairly straightforward. He undertakes the climb when no one is about and under circumstances which in no way inform him of the presence of a rescue unit a little distance from him. Would it not be unjust in circumstances such as these for the law to impute

to the amateur a foresight of his rescue? On the other hand, if the party is warned that the climb is difficult for the amateur and furthermore he realises that a rescue unit is on hand, then perhaps a foresight of rescue is not an unjust imputation. Similar examples are suggested by Winfield (see *supra*).

Another avenue open to the representatives of Dr. Baker would have been to sue the company for the negligence of their workmen when acting in the course of their employment. Barry, J., was of the opinion that the workmen were so acting and on existing authority there can be little doubt of this.

The cases of *Ward* v. *Hopkins* and *Baker* v. *Hopkins* raise several interesting points worthy of note and most forcibly point out the full implications of defining negligence in terms of reasonable foreseeability.

J. M. A. B.

County Court Letter

SECOND HELPINGS

LITIGANTS in person in the county court usually belong to one of three main classes :—

(1) Those who think that they are right, and will maintain that view come hell and high water ;

(2) Those who hope to persuade the court that they are right ; and

(3) Those who think that if they attend and put up some sort of show they may be able to get away with something.

The second and third classes usually accept the ruling of the court with little more than a sour look. Members of the first, however, being generally incapable of seeing anyone's point of view but their own, frequently greet the decision against them with a cry of " I shall appeal ! " often followed by an audibly scornful aside, " British justice ! " and an outraged stamp, or flounce, out of court, according to sex.

Fortunately for all concerned, this is usually where the matter ends. There are no doubt many admirable excuses that can be given to loved ones and neighbours for not pursuing to the House of Lords at least the cast-iron case that has been thrown out by the obviously stupid inefficiency, if not worse, of the court. One of these, no doubt, is that it is " not worth it," which in the great majority of cases is truer than the disgruntled one realises, since an appeal may well increase the costs that he or she has to pay out of all proportion to the value of the case. But on those occasions where the unsuccessful litigant is spurred into lodging an appeal by blind faith in his or her cause, on the taunts of a similarly afflicted spouse, it becomes necessary to persuade him or her to read, re-read, mark, re-mark, learn—if possible—and inwardly digest as far as may be such of the provisions of ss. 108 to 114 of the County Courts Act, 1959, as apply to the case in point.

Upsetting the registrar

Registrars, for their sins, see a great deal more of litigants in person than do judges, and under Ord. 37, r. 5, there is an absolute right of appeal from the decision of the former to the latter. This does not mean, however, that there is an absolute right to have the case re-tried. The notice of appeal must state its grounds, and must be served within six days of the decision appealed against. The judge has the power to vary the judgment ; to give another judgment in substitution for it ; to remit some part of or all the matters in issue to the registrar for re-trial or reconsideration ; or to order a new trial before himself. In the case of *Kirk* v. *Dale's Footwear Services* (1949), 99 L.J. 723, it was held that a party has no right to a re-trial simply because he is dissatisfied with the registrar's order, and in the very recent case *Devenish* v. *P.D.I. Homes (Hythe), Ltd.* [1959] 2 W.L.R. 1188, the Court of Appeal upheld a submission that a re-trial cannot be ordered on the sole grounds that additional evidence could be called, when in fact it was available at the time of the original trial. The right of appeal from the registrar is therefore rather more limited than might at first appear to be the case.

In the nature of things, a litigant in person is more likely to want to appeal on a matter of fact than on a point of law, but should it be the decision of the judge that raises the temper of his wrath to the boiling point of appeal, he will need to study the provisions of s. 109. The first thing that may shake him is that he has no right of appeal at all, even with leave, unless his case fits within the rather limited framework of the section. To start with, the claim must be for over £200, though it does not matter if the sum actually recovered is less than that (*Dreesman* v. *Harris* (1854), 9 Exch. 485). In the recent case of *Leslie* v. *Liverpool Corporation* [1960] 1 W.L.R. 1 ; p. 15, *ante*, it was held by the Court of Appeal that a claim for damages limited to £400 is not necessarily one for over £200, and the pleadings should state whether a sum exceeding this amount is or is not claimed. It seems unlikely that in practice one will ever see a claim for damages " limited to £400 but not exceeding £200," so presumably it is the claim " limited to £400 but exceeding £200 " that the Court of Appeal has in mind.

Back doors and back doubles

If defeated by the £200 rule, our do-it-yourself Marshall Hall may still find that he has a right of appeal because an injunction is involved, or the claim concerns land of an annual value of more than £60 (subs. (2)). Or, braving the complexities of subs. (3), it may be that his unappellable issue is made appellable because there is in the action some counter-claim which, though not itself the subject of appeal, falls within the categories previously mentioned. If so, he is in luck, always assuming that he is not now so bemused that he has come to the conclusion that, if you want to go appealing, the county court is by far the best place from which not to start.

Even when appeal is not possible, our friend may find comfort in Ord. 37, which sets out the circumstances in which a judgment may be set aside and a new trial ordered. Rules 2 and 3 deal with setting aside judgments obtained in the absence of the defendant or in default of defence. The power to do this is discretionary, and frequently the term is imposed that some sum of money should be paid into court to cover at least the costs thrown away. Rule 4 deals with setting aside for irregularity, and r. 6 with failure of postal service. But r. 1 gives the court a general power to order a new trial on any terms that it thinks fit. This

power must be exercised judicially and the order can only be made on grounds which would justify a similar order in the High Court (*Brown* v. *Dean* [1910] A.C. 373; *Guest* v. *Ibbotson* (1922), 91 L.J.K.B. 558). There must be at least a danger of some substantial wrong or miscarriage of justice; for instance, by reason of the misconduct of an officer of the court, or a party, perjury of a witness, and so forth. Surprise of a nature occasioning a miscarriage of justice, and occasionally the discovery of new and virtually conclusive evidence which could not have been produced at the hearing, may be grounds for ordering a new trial.

An appeal lies from a refusal to order a new trial, as it does from all interlocutory orders, if the judge, in arriving at his decision, did not apply the right rule of law. Generally speaking, no appeal can be made against a decision that is merely an exercise of discretion unless there is a clear miscarriage of justice.

The more belligerent type of litigant may like to remember that there is at present no appeal against an order of committal for contempt of court, nor is there one against an order made in respect of an attack on an officer of the court (*Lewis* v. *Owen* [1894] 1 Q.B. 102). Subject to these two exceptions, however, there appears to be considerable scope for those stalwarts who, encouraged by the much publicised success of Colonel *W.* & Co., decide to go it alone. Far be it from us to discourage such potential benefactors to the legal profession generally, but in view of some of the complications of the game peculiar to the county court, a preliminary work-out before a legal aid committee might possbily lead to a saving of effort, time, and money all round.

J. K. H.

HIRE-PURCHASE LAW: A NEW SURVEY

THE legal foundations of any expanding or developing economic system need to be periodically surveyed and adjusted. This applies as much to the law governing consumer credit as it does to that protecting the public in relation to investments, company control, bankruptcy and other branches of the law which it is now the accepted practice to re-examine at regular intervals. In England, since the last sweeping reforms of hire-purchase law in 1938, there have been regulations for restricting credit, for the time being at any rate defunct, an Act of 1954 which did little more than bring the limits of the Hire-Purchase Act, 1938, into line with the fallen value of money and an Act in 1956 to restrict hire-purchase advertisements, but no new radical reforms.

It is proposed in this article to examine some of the problems not dealt with in Mr. Aubrey L. Diamond's well-reasoned recent article in the Law Reform Series in this journal (103 SOL. J. 804). He there put forward the view that the innocent purchaser from a hirer who had a hire-purchase agreement should receive the same protection that innocent purchasers receive under s. 9 of the Factors Act, 1889, and s. 25 (2) of the Sale of Goods Act, 1893. He also suggested that s. 8 of the 1938 Act (relating to conditions and warranties) and s. 12 of the Act (restricting to court action the right of owners to recover their goods where one-third or more of the hire-purchase price has been paid or tendered) be applied to all hire-purchase agreements irrespective of the amount of the hire-purchase price. These matters, like those dealt with in this article, are based on practical problems which have arisen since 1938.

Definitions

The 1938 Act imposes much heavier restrictions on hire-purchase than on credit-sale trading. There are some traders who see in this a temptation so to draw their agreements that they appear to fall within the definition of "credit-sale agreement" rather than within that of "hire-purchase agreement" within s. 21 (1) of the Act. A credit-sale agreement is defined as "an agreement for the sale of goods under which the purchase price is payable by five or more instalments." Under s. 17 of the Sale of Goods Act, 1893, the property in goods passes under an agreement to sell when it is intended to pass, and therefore the parties may agree that the property in the goods will pass on payment of the deposit or on payment of any subsequent instalment. A minority of traders draw their agreements in this form, but the number of such agreements is not negligible. Usually such an agreement also provides that the vendor can require the purchaser to return the goods in default of payment of any instalment. If such agreements were enforceable and outside the protection given to hirers under hire-purchase agreements by the Hire-Purchase Acts, it is easy to see how vendors might obtain the goods and the price of them as well. It is true, as stated by Mr. Diamond in his cited article, that *Stockloser* v. *Johnson* [1954] 1 Q.B. 476, a decision that equity can relieve against forfeiture, might apply to relieve a purchaser under a credit-sale agreement if the court decided that the circumstances warranted it, but this is indeed a slender reed on which to rely. When one considers the authorities of which *Stockloser* v. *Johnson* was one, it is clear that a purchaser who has had the use or occupation of the property in respect of which he has incurred a forfeiture would find it difficult to obtain relief. It is submitted, however, that such an agreement, although on the face of it appearing to be a credit-sale agreement, is in reality a hire-purchase agreement within the meaning of the Hire-Purchase Acts.

Under s. 21 (1) of the 1938 Act a hire-purchase agreement is an agreement "for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee." The court will, in considering whether an agreement is a hire-purchase agreement or something else, look at the reality and not merely the appearance of the agreement (*Re Watson* (1890), 25 Q.B.D. 27). If both parties intend that the intending purchaser shall have the use of the goods before he is the owner and while he is making payments which cannot be returned if the sale does not take place, there would be a case that the agreement is really a hiring (a bailment within the definition in *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909) under which the property in the goods will or may pass to the bailee. The absence of such words as "hire" and "rent" can be no more decisive than their presence was held to be in ascertaining the true effect of an agreement (*Lee* v. *Butler* [1893] 2 Q.B. 318, and *Taylor* v. *Thompson* [1930] W.N. 16). Other reasons in support of such an agreement producing a bailment will be found in my article at 102 SOL. J. 497.

In view of the existence of the practice, and the belief in some quarters that it is both respectable and legal, it is

submitted that new legislation should make it clear that such agreements are within the definition of "hire-purchase agreement" in the Act. This could be done by enacting that an agreement for the sale of goods whereby the property in the goods is not to pass to the intending buyer until payment by him of the fifth or any later instalment of the purchase price of the goods shall be deemed to be a hire-purchase agreement within the meaning of s. 21 (1) of the Hire-Purchase Act, 1938.

Minimum payments

The 1938 Act restricted what was then miscalled the minimum purchase price to one-half of the hire-purchase price. If the hirer terminates his agreement under s. 4, he becomes liable to pay enough to make up what he has already paid and what is due to one-half of the hire-purchase price, or such less sum as the agreement provides. The note or memorandum of the agreement must set this out in clear terms in the form set out in the Schedule to the Act (s. 2 (2) (*c*)). This is also the maximum amount of the hirer's liability if the agreement or the bailment is determined in any manner whatsoever (s. 5 (*c*)). These sections marked a substantial advance, but experience has shown that they did not go far enough. Misfortune is apt to come suddenly out of the blue, and it sometimes becomes impossible to carry out engagements entered into only a short time previously. Death, incapacity or departure of a breadwinner are examples of such misfortune. Insistence on the letter of a hire-purchase agreement in such an event becomes harsh, and even at times unconscionable.

A minimum payment of 75 per cent. of the hire-purchase price was held exorbitant in *Landom Trust* v. *Hurrell* [1955] 1 All E.R. 839. The reasons given by Denning, L.J. (sitting as a judge of the Queen's Bench Division) were: (1) "It is inserted by the hire-purchase companies by rule of thumb without regard to the make of the car, its age, the market conditions or anything of the kind. It is the same for all"; (2) It is payable on the footing that the car when re-taken is in good order, repair and condition; (3) The owners can re-take the car on default at the end of the first month, and it is altogether extravagant to suppose that the value would have dropped by three-quarters in that time; (4) It might have dropped to one-half in six weeks, but not to one-quarter; (5) If a chattel (in that case a car) is let on a simple hiring, without a purchase clause, and the hiring is for one month, the hiring charged would be nowhere near three-quarters of the hire-purchase price, and yet it would have to cover depreciation.

Except that (3) and (4) refer to possible depreciation on a second-hand car in exceptional circumstances, all of the above factors would equally apply to a 50 per cent. minimum payment as they do to a 75 per cent. minimum payment, particularly the objection that the clause is inserted by rule of thumb, and the last test, of a simple hiring for a short term. Further, the 50 per cent. minimum payment applies where the owner terminates the agreement on the hirer's default (s. 5 (*c*)). That provision does not validate provisions requiring as much as 50 per cent. of the hire-purchase price to be made up on default by the hirer; it merely avoids a clause demanding more than that amount. Notwithstanding that such a clause is not void, it can be attacked as a penalty within the rule laid down in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co., Ltd.* [1915] A.C. 79, on the ground that it is not a genuine pre-estimate of the damage, on all or any of the grounds mentioned by Denning, L.J., in *Landom Trust* v. *Hurrell, supra*. Moreover, it must be presumed to be a penalty because the breach may be one of a number of possible breaches, substantial or trivial, and may in itself accordingly occasion damage, serious or trifling (cf. *Dunlop* case, *supra*, at p. 87). The anomaly results that a different measure of liability may be applicable where the hirer terminates the hiring, in which case he cannot question a minimum payment of 50 per cent. of the hire-purchase price as being a penalty (*Associated Distributors, Ltd.* v. *Hall* [1938] 2 K.B. 83), from that which is applicable where the owners terminate on the ground of the hirer's default, where the minimum payment can be attacked on this ground.

A further criticism of the present provision arises out of the fact that there is a certain amount of conflict in the authorities as to whether depreciation of the goods hired can properly be taken into account in a genuine pre-estimate of the damage suffered as a result of the hirer's breach of contract. Salter, J., in *Elsey & Co., Ltd.* v. *Hyde* (Jones and Proudfoot, Notes on Hire-Purchase Law, 2nd ed., p. 107), quoted with approval by Simonds, J., as he then was, in *Re Apex Supply Co.* [1942] 1 Ch. 108, said that damages for breach by non-payment would be "interest on the amount unpaid and nothing more. The fact that the hirer is in arrear with his payments will not entitle the owner to any damages for depreciation of these things." Jenkins, L.J., in his impressive dissenting judgment in *Cooden Engineering Co., Ltd.* v. *Stanford* [1953] 1 Q.B. 86, at p. 102, thought that compensation for depreciation was "a consideration obviously quite irrelevant to the breach of contract constituted by the hirer's being in arrear with his payments." The Court of Appeal decision in *Roadways Transport Development, Ltd.* v. *Brown and Gray* (Jones and Proudfoot, p. 118) and the judgment of Hodson, L.J., in *Cooden Engineering Co., Ltd.* v. *Stanford* conflict with this.

It is submitted that these anomalies and conflicts render some amendment of the law imperative. Probably the best amendment would be a clean repeal of the minimum payment provisions and substitution of a section avoiding any clause in a hire-purchase agreement within the Act requiring the hirer to pay, on determination of the agreement for any cause whatsoever, more than the deposit and instalments due and a reasonable sum for putting the goods into merchantable condition. If there is little more than negligible default among hirers nowadays, as some experts assure us, no financial problem can be created by throwing this particular ball back to the finance companies. In no event could such an amendment justify a rise in hire-purchase charges.

Assignments

Dealers often claim the recovery of goods as assignees from finance companies, the assignments having been made pursuant to recourse agreements which come into operation on default by the hirer. Under s. 12 (2) of the 1938 Act, "subject to such exceptions as may be provided for by county court rules, all the parties to the agreement and any guarantor shall be made parties to the action." No such exceptional provision has been made by the rules. It is the practice in some county courts not to require the finance company assignor to be joined as a plaintiff in an action by the assignee dealer, but merely to require the assignment to be produced. This is contrary to both the spirit and the letter of the Act. An assigneee is not a party to the agreement. The assignment is made without consulting the hirer. If "party" meant "assignee" and excluded the original party, s. 12 (2) would have so provided (cf. *Peace* v. *Brooks* [1895] 2 Q.B. 451). The agreement is not ended so

far as the assignor is concerned by reason of the assignment, and he is still a party, being liable under the conditions and warranties implied under s. 8 of the 1938 Act. The assignee cannot be held liable under these conditions and warranties, and it is for that reason that s. 12 (2) was enacted.

The practice of merely requiring the assignment to be produced without joining the assignor has grown because in the vast majority of cases the hirer does not wish to allege any breach of condition or warranty. His right to do so in the same action as that in which the hired goods are being claimed must be preserved, and in view of the apparent lack of success of the provision in s. 12 (2), consideration should be given to substituting a provision requiring the court, whenever a defendant indicates any dissatisfaction with the goods, to adjourn the hearing of the action so as to enable the finance company to be joined as plaintiff.

This is far from being a comprehensive list of the matters calling for reform. For example, I have not dealt with the problem of "the triumphant sneer of the debtor when he turns to the bailiff to reveal that all he possesses belongs to a hire-purchase company" (Mr. Lyndon Irving's letter at 103 SOL. J. 1026). There is a further question whether the exemption from distress of goods comprised in a hire-purchase agreement provided for in s. 4 of the Law of Distress (Amendment) Act, 1908, fits into a modern context. It is further questionable whether the law of reputed ownership both in the law of distress and the law of bankruptcy is quite up-to-date having regard to developments in the hire-purchase field. There is also the urgent question of registration of title to motor cars, on which both Mr. Diamond in his cited article and Messrs. L. A. Wallen and Jenkins, of Abertillery, in their letter at 103 SOL. J. 1026 have made constructive proposals. Further proposals for amendment have been made by the National Citizens' Advice Bureaux Committee in their evidence before the Board of Trade Committee on Consumer Protection, published on 4th January, 1960. There is enough, certainly, to warrant a full-scale official inquiry with a view to the complete overhaul of the law of consumer credit.

MAURICE SHARE.

A Conveyancer's Diary

TRUSTEE INVESTMENTS—I

THE paragraphs of the White Paper (Cmnd. 915) setting out the Government's proposals for extending the range of trustee investments were printed in this journal a few weeks ago (see p. 35), and a Bill to give effect to these proposals may be expected in due course. The new Trust Investment Act, or whatever it will be called, will apply to charitable trusts as well as to private trusts. There is nothing in the Charities Bill, briefly summarised in our issue of 12th February, at p. 113, on the investment of charitable funds, a matter which will therefore continue to be regulated by the law on the investment of trust funds generally. The policy behind these proposals has given rise to much debate in sections of the national Press, and in its course some details of the recommendations (e.g., the exclusion of solicitors from, and the inclusion of bank managers in, the list of "competent professional advisers" in investment matters which appears in the White Paper) have drawn comment. But the composition of the new list of trustee investments has so far been accepted largely in silence, at any rate in the legal Press. Yet this list seems to be open in detail to considerable objections.

Early legislation

When the first edition of Lewin on Trusts appeared in 1837, the author could advise trustees on their duties in relation to the investment of trust funds in the simplest manner. In the absence of any express power, the only unobjectionable investment, he wrote, was in one of the Government or bank annuities, and of such annuities the one which the court had thought proper to adopt was the 3 per cent. Consolidated Bank Annuities, "the fund, from its low rate of interest, the least likely to be determined by redemption." Despite this advice, however, there was a tendency even at that time for trustees to invest in real securities, and this practice was eventually recognised by legislation in the Law of Property Amendment Act, 1859 (commonly known as Lord St. Leonards' Act), which provided that when a trustee was not expressly forbidden to invest in real securities in any part of the United Kingdom, it should be lawful for such trustee to invest the trust fund in such securities; and further, that if not similarly forbidden, it should be lawful to invest in Bank of England or Bank of Ireland stock or in East India stock, provided, in either case, that such investment should in other respects be reasonable and proper. This power was almost immediately extended by the Law of Property Amendment Act, 1860, which enabled general orders to be made as to the investment of cash under the control of the court in such investments as the Lord Chancellor, acting under advice, should designate, and made such designated investments, in effect, authorised trustee investments. These powers were incorporated in, and greatly extended by, the Trust Investment Act, 1889, the provisions of which were repealed and substantially re-enacted by the Trustee Act, 1893. It was at this time that various classes of railway companies' stocks and shares and the stocks of certain local authorities became trustee investments. The Act of 1893 was repealed by the Trustee Act, 1925, which replaced the list of investments contained in the earlier Act by s. 1 of the present Act.

Existing trustee investments

This is therefore the existing list, but many of the investments which it includes are no longer available. The railway companies have gone. In the case of companies which operated in the United Kingdom, Transport Stock has taken the place of their authorised stocks and shares; but the stocks and shares of certain Indian railways, which were a popular investment, have gone without replacement. Local authorities' stocks remain in the list, but in the decade which followed the last war their volume declined relatively as a result of the central government affording more attractive facilities for local government borrowing than those available in the market (and, from time to time, prohibiting resort to the market). All these investments, with the single important exception of real securities, yield income at a fixed rate of interest. (Trustees lending on mortgage may agree not to call in the mortgage moneys for a period not exceeding seven

years, under s. 10 (1) of the Trustee Act, 1925; but, subject to this provision, which is not often resorted to nowadays, a demand for payment of the mortgage money can be used as a device for increasing the rate of interest applicable to the loan.)

This limited range of investments, most of it subject to the full blast of inflation, has in recent years acted as a stimulant on many trustees not authorised by the trust instrument to invest outside the range to seek extended powers of investment from the court. There has been some difference of judicial opinion in the past as to the jurisdiction to make orders extending trustees' powers of investment generally. This is now a wholly arid controversy: in the case of public or charitable trusts, orders can be made either by way of scheme under the Charitable Trusts Acts, or under s. 57 of the Trustee Act, 1925, and these jurisdictions should be invoked in the alternative, so that the judge may make the order in exercise of one or the other, according to his personal views; in the case of private trusts, the Variation of Trusts Act, 1958, has made it unnecessary to resort, for this purpose, to s. 57, as to which there has been some doubt in this connection (see, e.g., *Re Coates' Trusts; Re Byng's Will Trusts* [1959] 1 W.L.R., at p. 328).

Importance of the nature of powers

But it is not the method by which extended powers were conferred (and are, to some extent, still being conferred) by the court upon trustees which is important: it is the nature of the powers which, I think, requires careful consideration when the Government's present proposals are being examined. Specimen orders will be found in certain reported cases, e.g., *Re Royal Society's Charitable Trusts; Royal Society* v. *A.-G.* [1956] Ch. 87, and (the most recent) *Re Royal Naval and Royal Marine Children's Homes, Portsmouth; Lloyds Bank, Ltd.* v. *A.-G.* [1959] 1 W.L.R. 755. These were, of course, cases of charities, and in such cases it was, generally, the view of the Attorney-General (a necessary party to such applications) that the investment of a proportion of the fund (e.g., one-third) should be confined to investments authorised by the general law for the investment of trust moneys, and that any extended powers should be applicable only in relation to the remainder of the fund. As a matter of machinery, this restriction could operate in one of two ways, either by a proviso that no funds should be invested outside the strict trustee security range if the value of the investments in that range are at the time of, or would by reason of, the proposed investment become less than one-third of the value of the fund (*Royal Society's* case), or by dividing the trust fund *ab initio* into two parts of specified proportions and providing that moneys forming part of one such part might be invested only in the strict trustee range while moneys forming part of the other such part might be invested either in that range or in the extended range (the *Children's Homes* case). I mention this here for two reasons. First, the Government's proposals include a provision for the division of the fund *ab initio* into two (equal) parts, in relation to only one of which parts will the new powers of investment in their most extended form apply (para. 5 (1) of the proposals). But, secondly, this fractional limitation is a limitation which the court in exercising its jurisdiction to extend investment powers has, so far as I am aware, thought fit to impose in the ordinary way only in the case of charitable trusts. In the case of private trusts, where powers have been conferred authorising investment (subject to certain conditions) in the ordinary capital of industrial and commercial companies, no fractional limitation of this kind has ordinarily been imposed. So far as the law and the recent practice is concerned, therefore, there is nothing sacrosanct about the half-and-half rule which is included in the Government's proposals. Its inclusion must be justified on other grounds. One such, doubtless, is public policy, and on that ground the $\frac{1}{2}:\frac{1}{2}$ ratio may be right. But persons interested in trust funds will not find this ratio very generous if the national economy suffers another bout of inflation.

(*To be concluded*)

"A B C"

Landlord and Tenant Notebook

WILFUL HOLDING OVER WITHOUT CONTUMACY

"If you could show that the defendant had read Smith's Leading Cases, and knew what an estoppel was, your argument might be better founded," said Crompton, J., to counsel for the plaintiff in *Swinfen* v. *Bacon* (1861), 6 H. & N. 846, an action for double value under the Landlord and Tenant Act, 1730, s. 1. "In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place," said Paull, J., in *French* v. *Elliott* [1960] 1 W.L.R. 40; p. 52, *ante*. This Notebook discussed the said muddle on p. 142, and this week I propose to say something about the plaintiff's claim for double value.

For although there have been a number of decisions on the point, it has not been altogether clear what will constitute "wilfully" for the purpose of the section, which reads:

> "In case any tenant or tenants for any term for life, lives, or years, or other person or persons who are or shall come into possession of any lands, tenements, or hereditaments by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, etc., after the determination of such term or terms, and after demand made and notice in writing given for delivering the possession thereof by his or their landlords or lessors, etc., then and in such case, such person or persons so holding over shall, for and during the time he, she, and they shall so hold over or keep the person or persons entitled out of possession of . . ., pay to the person or persons so kept out of possession, their executors, etc., . . . at the rate of double the yearly value of the lands, etc., so detained, for so long time as the same are detained . . ."

In cases in which the meaning of "wilfully hold over" has been discussed, reference has been made to such elements as fraud, conscientious belief, conviction of rectitude, contumacy, and the tenant's behaviour during the term.

Fraud

The relevant facts of *Wright* v. *Smith* (1805), 5 Esp. 203, were that the defendant had been granted a lease by a life tenant which the remainderman succeeded in impugning as not having reserved the stipulated best improved rent; he sued in ejectment and executed the judgment, and then brought an action for double value. It was agreed that authority was lacking but the argument for the plaintiff

drew attention to the heading to the statute (An Act for the more effectual preventing frauds committed by tenants, etc.) and to the reference to collusion in the section. The defendant's contentions were that the sort of mischief to prevent which the enactment was passed no longer occurred, that it was not that sort of mischief anyway, and that it did not apply where the ex-tenant was convinced of his rectitude and could not know, at the time, that he was in the wrong. Macdonald, C.B.'s judgment does, at first sight, suggest that he considered fraud an essential: the section, he said, was never meant to apply where no fraud was intended. But the learned chief baron went on to say that it was clear that where there was contumacy, it would apply; and, by stating at the conclusion of his judgment that there was no contumacy, nor any fraud, showed that he was giving a very wide meaning to the term "fraud."

It may be recalled that at the time when the Act was passed Parliament appears to have been much concerned about fraudulence of tenants. The Landlord and Tenant Act, 1709, is headed "An Act for the better security of rents and to prevent frauds committed by tenants"; the heading to the Distress for Rent Act, 1837, likewise refers to the prevention of frauds, and its preamble to the inadequacy of recent legislation.

But it was not necessary for Macdonald, C.B., to express his reaction to the *cessante ratione cessat lex* plea, which would have involved examining the delicate question whether the standard of honesty among tenants had improved during the eighteenth century. That such a plea may succeed was somewhat surprisingly demonstrated by *Warner* v. *Sampson* [1959] 2 W.L.R. 109 (C.A.), when, holding that a general traverse did not constitute a repudiation entitling a landlord to disclaim, Denning, L.J., quoted a passage from Lord Atkin's speech in *United Australia, Ltd.* v. *Barclays Bank, Ltd.* [1941] A.C. 1: "When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course is for the judge to pass through them undeterred."

Contumacy

In *Soulsby* v. *Neving* (1808), 9 East 310, Lord Ellenborough, C.J., said that *Wright* v. *Smith* had proceeded on the ground that the statute was only meant to apply to the case of "a wilful and contumacious holding over by the tenant . . . and not to a bona fide holding over by mistake."

Macdonald, C.B., can be said, then, to have introduced the contumacy consideration; and this was—unfortunately, I think—made a test in *Soulsby* v. *Neving*, *supra*.

In *Swinfen* v. *Bacon*, *supra*, in which the defendant had accepted a new tenancy from his original landlord's devisee and then found that the heir-at-law was disputing the will, the argument for the plaintiff appears to have been inspired by the earlier part of the judgment in *Wright* v. *Smith*: it was urged that holding over was dangerous in that it might lead to fraud. The contention was then made that "wilfully" meant no more than "intentionally"; and, by reference to *Doe d. Marlow* v. *Wiggins* (1843), 4 Q.B. 367, in Smith's Leading Cases, 654, that the defendant could not deny his landlord's title. It was this argument which occasioned the judicial interjection cited at the commencement of this article. But it was Cockburn, C.J., who delivered the judgment, holding that there must be contumacy, which meant that there must be no bona fide belief, and that it was only when the defendant was conscious that he had no right to retain possession that he was liable for double value.

And in *Crook* v. *Whitbread* (1919), 35 T.L.R. 522, in which the claim was optimistically made against a Rent Act protected tenant, Avory, J., described the effect of the authorities as that "wilfully" meant "wilfully and contumaciously, and not merely by mistake or under a fair claim of right." "In all those cases it was held that there must be something in the nature of contumacy on the part of the tenant in holding over . . ."

Shall and will

In spite of the above authorities, Paull, J., has now discredited the contumacy test as being unnecessary. The plaintiffs in *French* v. *Elliott*, *supra*, sought to rely on their tenant's alleged misconduct during the term as well as on his retaining possession after expiry of the disputed notice; dealing with both points, the learned judge said: "It has been held that 'wilfully' means 'contumaciously,' but I can see no reason why the old English word 'wilfully' does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumacious tenant. It deals only with the moment of time when the tenancy comes to an end. At that moment of time a tenant may say: 'I shall stay on. I think I have a right to do so.' His staying on is not wilful. On the other hand, a tenant may say: 'I will stay on, although I know I have no right to do so.' That is wilful, and well illustrates the now sometimes forgotten distinction between 'I shall' and the insistent 'I will.' In this case there was, in my judgment, a sufficient muddle on both sides," etc.

Simplification ?

It may seem, at first sight, that Paull, J., somewhat hastily and cavalierly brushed aside the established authorities as being the result of unnecessary labour. But if one attempts to visualise circumstances in which a holding over could be said to be wilful, and within the mischief of the Landlord and Tenant Act, 1730, s. 1, without being contumacious, one will think of the kind of person who can be confuted but not convinced. Dr. Johnson, I believe, once ascribed this characteristic to a whole sex; it is not necessary for me to go into the question whether that proposition was ever valid; but, postulating that resistance to the authority of a court of law is a more serious matter than resistance to a landlord entitled to possession, I would refer to the facts of *Re Davies* (1888), 21 Q.B.D. 236. The tragic heroine of that proceeding had unsuccessfully sued for possession of two houses and then spent some eighteen months in prison (though not in prison dress) for contempt of court in disobeying an injunction forbidding her to take forcible possession; and Mathew, J.'s "But Mrs. Davies, it would seem, cannot be prevailed upon to acknowledge that she is in the wrong" illustrates my point. She was no doubt convinced of her rectitude and conscientiously believed that she had a right to the two houses; she was wilful rather than contumacious. Paull, J.'s judgment accords, in my submission, with that of Macdonald, C.B., in *Wright* v. *Smith*, *supra*, which merely amounted to this: all contumacy is wilfulness—not that there cannot be wilfulness without contumacy; Cockburn, C.J.'s judgment in *Swinfen* v. *Bacon*, *supra*; Lord Ellenborough's judgment in *Soulsby* v. *Neving*, *supra*, and Avory, J.'s judgment in *Crook* v. *Whitbread*, *supra*, were based on a fallacy.

R. B.

Wills and Bequests

Mr. BENJAMIN WYNDHAM THEODORE VINT, solicitor, of Bradford, left £23,701 net.

A LETTER TO MY GODSON

DEAR CHARLES,

I was very glad to hear that you qualified at the last Finals and that you will be starting with your old firm as a salaried solicitor next week. It is a great comfort to do your first year as a qualified man in familiar surroundings.

You told me you will mainly be dealing with conveyancing and ask if I can give you any hints. I expect that on purely legal matters you could put me right on many things but there are some practical aspects of conveyancing which you cannot have learnt as an articled clerk or at law school.

To a beginner the conveyancing job is just a file with a couple of names on it. He looks upon it as a legal exercise which he must try to complete perfectly. But you will never keep clients unless you use your imagination all the time and remember that behind every file there is a man and a family facing one of the most important and worrying moments in their lives.

You should try to start every job, whether sale or purchase, by getting your client to come to the office and have a talk. To begin with you both get to know each other, which is a good thing, but in addition, if you make thorough use of the interview, you can save endless time and trouble later on.

Suppose you are acting for a vendor. So many people lose time getting hold of the deeds before they start. If the vendor is coming to see you, ask him to bring the deeds, or when he is with you, you can find out where they are and at the same time get him to sign an authority to have them handed over. What is more, you can go through the printed list of preliminary inquiries with him, while he is sitting there on the other side of your desk, and you can get him to tell you the answer to all those practical things that a solicitor is not expected to know and must ask his client. You know the questions will come sooner or later. Deal with them right at the start. Most important of all, you should start planning your completion statement at this very first interview with your client. So many people forget about the completion statement until the conveyance is engrossed and they are nearly ready to complete. It may take a lot of time to get together all the receipts, particularly in these days when we often have to write specially to a local authority to get one. Do not be afraid to ask your client to find things out and collect information together. While I am not suggesting you should try to swing on to your client any work that is properly yours, there are many facts and figures that only the client can supply and I have never known one who was unwilling to do his part provided he was clearly told what you wanted. Curiously enough, the more you ask a client to do, the more you impress him with the complexity of the process involved in transferring property. If you try and do a job without bothering your client at all, he will assume that there is nothing in it. If you make him a partner in the work, he realises just how complicated it all is.

Both with the vendor and with the purchaser, try and fix a timetable. This is particularly important to purchasers. Remember that completion to you means moving-day to him. Moving-day is a crisis in any family. The children have to be sent away to stay with auntie, the husband arranges the day off and friends are mobilised to help. Your client's wife will be thinking for weeks about the problems of moving-day and one of the most vital things for her is to have a fixed date. You just cannot play ducks and drakes with completion date in the purchase of a dwelling-house. If you come up against a snag in the title, you are not free to go on pursuing it as an interesting academic point. If it is a serious point, of course, you must pursue it and it may even be so serious that it will justify a postponement of completion, but you must do everything you possibly can to get over the difficulty without losing time. If things get really desperate, you must not be afraid of asking your client to call urgently, telling him the degree of risk involved and asking him to choose between accepting the risk or postponing completion.

The vital thing is to have the target date for completion written in great big red letters on the front of your file. You must not look on completion date as a pious hope but as something unalterable. Of course it will have to be altered if things go really wrong, but this should only be done in an emergency and with the client's consent.

That is why it is so important to work out a timetable at the start. It must be a realistic timetable. Many clients will come to you and ask you to complete a purchase in three weeks. You must tell them it simply cannot be done; unless they are prepared to give you an indemnity releasing you from your responsibility for ensuring their safety—in short, to let you off all the responsibility that it is your job to carry. Assuming they want you to safeguard them, as they always do, you must work out with them the time the job is likely to take. Point out to them, if they are relying on getting a mortgage from a building society, that negotiations with the building society will add two weeks at least. Always remind them that even if *you* deal with everything by return of post, you are at the mercy of many other people (including your own client) who cheerfully allow several days to pass before replying. I am not saying you could not complete a purchase in less than eight weeks, but if you are dealing with a client who has got a moving-day to arrange, allow yourself a little elbow room. You might agree to do it in six weeks if he was really desperate, but you would have to keep your eye on the timetable every day. Above all, if you find the job is getting behind hand, warn your client at once. Do not wait until a few days before completion and then weakly tell him you are afraid it is going to be a fortnight late.

On nearly every count, it pays to keep in touch with your client while the job is running. You may have sixty conveyancing files on your desk (I think a competent solicitor can easily run that number), but to your client his particular purchase is the one and only event in his life and he thinks about it all day long. You may be getting on splendidly but if you do not drop him a line once a week and tell him so, your feelings will be hurt one morning by receiving a very rude letter from him. It will be your own fault. You are working for a living man, not for a cardboard file, and you must remember that man's feelings every minute of the time you are working for him.

While you are running the job, there are so many ways in which you can save time, both for yourself and for the solicitor on the other side. Even if you cannot draft the contract, send the purchaser's solicitor a plan so that he can be getting on with his searches. Send him a form of preliminary inquiries with replies when you submit the draft contract. Why wait for him to post you the form and fill it in later?

Always prepare your abstract before you draft your contract. There is no better way of making quite sure that you have absorbed everything in the title that might have to go into the contract. In addition, it means that when

contracts are exchanged, your abstract is all ready and you will post it to the purchaser along with his part of the contract. I find few things so irritating as exchanging contracts containing an early completion date and then being kept waiting ten days by the vendor's solicitor before I receive the abstract.

When you are perusing an abstract yourself, be practical. Articled clerks and barristers sit down to an abstract and try to think out the maximum possible number of requisitions. A practical solicitor faces an abstract with the determination to ask the minimum number of requisitions consistent with his client's safety. Requisitioning is a dreadful opportunity to show off. Resist it. Above all, ask only what you *must* ask and not all the questions you *could* ask.

I expect that before long all abstracts that you will receive will be photostat copies of the originals and a very good thing too. It will do away with the time-wasting business of examining the deeds, which most of us do far too late anyway. As I have always had the good fortune to work among honest solicitors, I have often wondered why we do not just lend the title deeds to the purchaser's solicitor, to be returned or retained on completion, as the case may be. I see no reason why we should not do it with solicitors we know well.

A special word about deposits and insurances. Do not quarrel with estate agents about whether he or you shall hold the deposit. Unless you know he is a crook, let him have it. It pleases him and you make a friend. It does you no good to have it and you make an enemy. Remember as regards insurances that men with insurance agencies and little minds are very common and your client may be one. Never offer to insure the property for him without first asking him whether he has an agency of his own or an agency he particularly likes to use, or he will suspect you of trying to rob him of business (probably worth at least 3d. a year) and hate you accordingly.

Finally, when you are drafting, do write plain English. There are a number of terms of art you must use in drafting a conveyance and that is unavoidable. But in contracts and in drafting schedules to conveyances, good plain English contains fewer pitfalls and double meanings than that tortured jargon which so many articled clerks pick up from reading old documents and copy for the rest of their lives, believing that somehow a document cannot be legal unless it is written that way. You will find, incidentally, that your clients respect you much more if you write good English than if you try to fog them with legal jargon. This may not have been true fifty years ago, when people were less well-educated and less critical of experts, but it is certainly true now.

Above all things, never fall into the pitfall of believing that conveyancing is easy. It is not. It is the very devil. Every job is different, except that they are all full of traps. Do not be clever. Do not be too legal. Ring up your client immediately after completion and tell him the good news and you make a friend. Get your purchaser into his new home punctually. Send your vendor a cheque the very night you complete. And you will find conveyancing both pleasant and profitable.

Yours sincerely,

E. A. W.

HERE AND THERE

THE DOG AND THE JURY

LAST week we commenced an inquiry into the manners and customs of the United States of America for the benefit of those British lawyers who, later in the year, intend to discover or rediscover the erstwhile New World which, although its novelty has somewhat worn off in the course of the last few hundred years, still retains a good deal that seems curious to the European traveller, oddly mixed up with things which seem familiar. Take the dog, that influential friend of man, who has so powerful an ascendancy over the minds and characters of the English; you will find that in the States also he has an honoured place in society. American dogs have stomach ulcers, just like American business men, and for the same causes—the fears and tensions of modern life, city traffic, doubtful food and relations with other dogs. They have been known to wear spectacles when they become short-sighted. In New York special perfumes have been put on the market for gay dogs—Kennel No. Nine, for instance, at $2.50 an ounce. Their place in social life is as secure in America as in England, but they are still only on the threshold of public life, its duties and obligations. Still, quite recently a novelty in murder trial procedure was inspired by a dog—a dog who had nothing to do with the case. It happened in Chicago where the jury was about to be locked up for the night. "You can't do that, judge," protested one of the jurymen. "I have a dog who has to be fed. You can't let him starve. I have to get home." The judge explained that at that stage the jury were forbidden by law to separate and suggested that the court bailiff might deputise as the dog's waiter. But the dog, it seems, was like some diners. "He is a vicious dog," said the juryman. "No one can do anything with him. He will tear the person to pieces." The bailiff, thus intimidated, suggested that the only solution was for the whole jury to go and feed the dog collectively and the judge agreed. So all twelve piled into a bus. All twelve respectfully attended the dog's dinner. All twelve walked warily behind while the dog was escorted on his digestive walk. Then they boarded the bus and started thinking about murder again. It is surely time to embody in a short Act of Parliament the principle that no one should be summoned to serve on a jury without his dog being summoned too. It is well known (to all dog lovers, at least) that dogs are singularly astute and accurate in their judgment of human beings. Rover could tell in an instant whether, in his opinion, the prisoner in the dock, the witness in the box and even the judge on the Bench were trustworthy, and Rover has the habit of indicating his preferences in no uncertain terms. It would greatly simplify criminal procedure, save, of course, where there was a disagreement among the jury and a dog fight in the jury room.

SIMPLE STILL

ONE of the paradoxes of American life (at any rate, as seen from this side of the Atlantic) is that while urban mechanical civilisation seems to have advanced far faster there than anywhere else in the world with its sky-scraping cliff dwellings and its population which seems to live and move and have its being permanently on wheels, in other respects life and law

seem to retain a rustic simplicity. Take, for example, this instruction from the Deputy Police Chief of Washington on how to hold a suspect. He should be held from behind by the trousers and the belt. Why? "To escape, a prisoner should have to jump out of his pants." That belongs far more to the small town and the village than to the sophisticated subtleties of the great cities. Even the robbers, or some of them, seem to move in the same world of engaging simplicity. In Detroit recently the two elderly ladies who kept a bakery were able to deal with a hold-up man with a minimum of disturbance. One explained that they had only small change left. The other suggested: "Why don't you go next door to the meat market? They have a lot more money." Gratefully he adopted the idea and while he was holding up the butchers the ladies at the bakery telephoned the police, who arrested him on his way out. About the sentences of American courts there is often a direct paternalism, very different from our own dull, ill-imagined routine of prison, fine or binding over. Recently a hunter who shot a deer out of season in Florida was ordered to replace it by four does by 1st April or go to prison for sixty days. At Easton in Pennsylvania two youths had goaded and teased an immigrant neighbour until he had shot at them. The judge sent the man to gaol for the shooting, but ordered the youths to visit him daily and recite him the parable of the Good Samaritan. The first time they failed to appear the man was to be released. The immediate effect was that they asked his forgiveness and said they would not be back again. Perhaps we may look forward to a touch of that Sancho Panza justice when the British lawyers return to Europe.

RICHARD ROE.

REVIEWS

The Criminal Prosecution in England. By PATRICK DEVLIN. pp. viii and 118. 1960. London: Oxford University Press. 15s. net.

This little book is based on the Sherrill Lectures which Devlin, L.J., gave at the Yale University Law School in 1956, and the size of the work bears no ratio to its importance. In it his lordship expounds in clear and simple language the conventions as well as the rules wherewith criminal investigation by the police is kept under judicial control, and the fair precepts that guide the Bar in the conduct of criminal proceedings. As if the learned judge's experience and erudition were not enough to guarantee an absolutely impeccable production, the script was read by two prominent officials whose duties bring them in direct contact with the day-to-day routine of criminal investigations and criminal prosecutions, namely, Sir Theobald Mathew, the Director of Public Prosecutions (himself the author of two relevant lectures published by The Solicitors' Law Stationery Society, Ltd.), and Mr. R. L. Jackson, who—before graduating as Assistant Commissioner of the Metropolitan Police in charge of the C.I.D. at New Scotland Yard—served in the department of the Director of Public Prosecutions.

At first we are shown how institutions in this country come and go; but they die hard and their useful functions survive. Thus when the grand jury had outlived its purpose, its functions were taken over by the justices and the judges. Again, contrary to common belief, the fathers of the police are the justices of the peace and their grandfathers the jury of presentment—the parish constable bequeathing little else than his name to the modern policeman on the beat. When it comes to present-day procedure, the treatment continues its deft and ingenious course. A signal example of it is the original reference to an unsuspected benefit which accrues to the administration of justice from the existing division of the legal profession into barristers and solicitors. About 20,000 of the latter are—like G.P.s—scattered all over the country, because they are needed locally to draft leases and other contracts, deeds of partnership and of land transfer, memoranda of association and wills; to conduct ordinary cases in the magistrates' courts and county courts; to instruct their town agents in respect of High Court actions; and so on and so forth. Many of them conduct their business from their offices, relying on their managing clerks to do their out-of-office work; so that they need not meet each other very frequently or see a High Court judge from one end of the year to the other. Most of the 2,000 practising barristers—including all the leading counsel—on the other hand, congregate in and around the Temple, where they lead a collective and co-operative professional existence—with social aspects to it. Moreover, they regularly meet the judges in Hall and on circuit—the judges themselves being recruited from the Bar. All this makes for community of thought and renders the Bar easily amenable to judicial influence, an influence which they in turn transmit to the receptive police. This process is all the more effective for its subtle informality, and the net result of the working of unwritten rules and precise formulæ is fair trials throughout the land. Indeed, unwritten rules suit the people of this country because of their high standard of decency and common sense. For just as, where integrity and wisdom prevail, oral agreements are effective—while, in the absence of these attributes, even written contracts will not bind—so where decency and common sense abound conventions will suffice, though if these qualities were absent rigid rules and firm formulæ would not avail.

As solid and instructive as a text-book, as light and interesting as a novel—a book for the million.

I Married the Girl. By CLIFFORD MAXWELL. pp. 174. 1960. London: Michael Joseph, Ltd. 13s. 6d. net.

If you enjoy French bedroom farces and are intrigued by divorce lore, this is the book for you.

BOOKS RECEIVED

Notes on District Registry Practice and Procedure. Supplement to Eleventh Edition, 1958. By THOMAS S. HUMPHREYS. pp. 11. 1960. London: The Solicitors' Law Stationery Society, Ltd. 2s. net.

Harris's Criminal Law. Twentieth Edition. By H. A. PALMER, M.A. (Oxon), of the Inner Temple, Barrister-at-Law, and HENRY PALMER, M.A. (Oxon), of the Inner Temple, Barrister-at-Law. pp. li and (with Index) 706. 1960. London: Sweet & Maxwell, Ltd. £2 5s. net.

"THE SOLICITORS' JOURNAL," 25th FEBRUARY, 1860

ON the 25th February, 1860, THE SOLICITORS' JOURNAL reported the opening of the Appleby Assizes: "The learned judges, Mr. Justice Hill and Mr. Justice Blackburn, were accompanied by the present high sheriff, Mr. Matthew Benson Harrison, and escorted by javelin men and trumpeters in the costume of the reign of Charles I. The men were dressed in leathern doublets with blue velvet sleeves slashed with white silk, blue velvet breeches, high buff buckskin turnover boots, sombrero hats buttoned up at the side and ornamented each with a long blue and white feather, and cross-belts with large buckles suspending old-fashioned large-handled swords; a red sash round the waist completed their costume. The trumpeters wore grey hats looped up; in other respects the same dress. The javelins also were very formidable antique-looking weapons. As they marched before the judges the scene carried back the mind to the days of the Cavaliers and formed a very picturesque and lively display."

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and, in general, full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note

Court of Appeal

ESTATE DUTY: CAPITAL SETTLED IN THIRDS ON REMAINDERMEN LIVING ON DETERMINATION OF PRIOR LIFE INTERESTS

***In re* Boulton; Public Trustee *v.* Robb**

Lord Evershed, M.R., Willmer and Upjohn, L.JJ.

22nd January, 1960

Appeal from Vaisey, J.

Section 9 of the Finance Act, 1894, provides: "(1) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; . . ." A testator, who died in 1914, directed his trustee to hold a fund upon trust to pay the income to his sister *C* for her life and, in the event which happened, of her having no issue, the fund was to be held in trust for his sister *M* for life and her issue; subject to such trusts, the testator directed that the trust fund should be held on trust in equal shares for such of three named cousins as should be living at the death or failure of the issue of the testator's last surviving sister, such cousins' issue to take their parents' share *per stirpes*. All three cousins named in the will died before the sisters named in the will. All left issue who lived to take a share of capital. In 1950 the sister *M* assigned her reversionary life interest to the trustees of the will (subject to the reservation to herself of an annual sum which was also subsequently similarly assigned) upon trust to pay the income of the fund to the same persons and in the same manner as it would have been payable under the will if she had died. By an assignment of 1951 *C* assigned to *R* (the only child of one of the then deceased cousins) one-third part of her life interest in the trust fund to the intent that such life interest should, so far as the law permitted, merge in the reversionary interest of *R*. *C* died in 1958 and *M* in 1959, both unmarried. On the death of *C*, estate duty was claimed on the two-thirds of the trust fund of which she was in receipt of the income at her death. The question raised was whether the duty ought to fall exclusively on the two-thirds of the fund or rateably on the whole fund. Vaisey, J., held that the estate duty leviable on two-thirds of the trust fund on *C*'s death ought to fall for all purposes on the part of the trust fund in which *R* was not beneficially interested. Certain beneficiaries appealed.

LORD EVERSHED, M.R., said that he did not at all dissent from the general proposition that, strictly speaking, and certainly to the eye of a conveyancer, a person having an interest such as *C* had in a trust fund like the one in question could not sever it into distinct properties. But he (his lordship) did not, with all respect to the appellants' argument, think that that was quite the problem which the court had to decide. On the evidence it seemed quite plain what had occurred. The Estate Duty Office had claimed to levy duty on two-thirds only of the residuary estate. They had taken a view which, whatever might be said against it by a conveyancer, at any rate corresponded quite manifestly with common sense and, he (his lordship) would be inclined to think, with justice; they had said: "If you look at the facts as they were when *C* died, it appears that two-thirds of the estate then passed and one-third did not; and the one-third did not pass because *R* enjoyed both before and after the death to exactly the same extent, one-third of the trust property or its income." The claim, therefore, was made, so far as could be seen, in respect of two-thirds of this trust property and no more. Assuming, as he (his lordship) thought one must, that the Estate Duty Office had rightly levied estate duty on two-thirds of the trust funds on the footing that the remaining third did not pass on the tenant for life's death, then the conclusion followed that under s. 9 (1) of the Finance Act, 1894, the burden of the duty fell to be borne by the two-thirds of the fund which attracted the levy. Accordingly, the appeal would be dismissed.

WILLMER and UPJOHN, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *John Pennycuick*, Q.C., and *Hector Hillaby* (*Radcliffes & Co.*); *E. I. Goulding* (*Lawrence, Graham & Co.*); *B. L. Bathurst*, Q.C., and *Eric Griffith* (*Payne, Hicks Beach & Co.*; *Wild, Collins & Crosse*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] [1 W.L.R. 140

Queen's Bench Division

CRIMINAL LAW: PRISON COMMISSIONERS' REPORT

R. *v.* Governor of Parkhurst Prison; *ex parte* Philpot

Lord Parker, C.J., Hilbery and Pearson, JJ.

11th December, 1959

Application for writ of habeas corpus.

The applicant, who was sentenced in 1953 to a term of preventive detention, applied for a writ of habeas corpus on the ground that, before being sentenced, no copy of the Prison Commissioners' report had been given to him or his counsel or solicitor as required by s. 21 (5) of the Criminal Justice Act, 1948.

LORD PARKER, C.J., said that the sole question was whether the words "shall be given" in s. 21 (5) of the 1948 Act were merely directed to the procedure which should be followed, or whether they were imperative and were making it a condition precedent to a sentence of preventive detention that the copy should be given. His lordship was satisfied that those words were directed only to the procedure to be followed. They were in direct contrast to the words used in s. 23, which provided for a notice being served of the intention to prove previous convictions. The matter was made even clearer when one realised that it was not in every case that there had to be a Prison Commissioners' report. In a case where a report of that sort was not of itself a condition precedent to a sentence of preventive detention, it was all the less reason for saying that the handing of a copy to the prisoner was itself a condition precedent. Accordingly the application failed and should be dismissed.

HILBERY, J., delivered a concurring judgment.

PEARSON, J., agreed. Application dismissed.

APPEARANCES: *Neil Butter* (*Official Solicitor*); *J. R. Cumming-Bruce* (*Treasury Solicitor*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 115

JUSTICES: WHETHER CLERK'S NOTES OF EVIDENCE PRIVILEGED

McKinley *v.* McKinley

Wrangham, J. 15th December, 1959

Interlocutory appeal from the district registrar at Kingston-upon-Hull.

A wife unsuccessfully took proceedings against her husband before a magistrate, and the assistant to the magistrates' clerk took a shorthand note of the evidence in those proceedings. The husband later petitioned against her for divorce in the High Court and the wife, wishing to adduce evidence of what had occurred in the proceedings before the magistrate, issued subpœnas against both the clerk and his assistant to

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(*continued on p. xix*)

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attend and bring with them a transcript of those proceedings and the relevant notebooks. The district registrar ordered that the subpœnas be set aside on the grounds that the clerk was a privileged person, and that the notes of evidence were privileged documents. It was conceded that the clerk would be able to give relevant and admissible evidence. From this order the wife appealed.

WRANGHAM, J., said that the conclusion at which he had arrived after consideration of the authorities was that there was no rule which prevented a magistrates' clerk from being compelled to attend and give evidence in a divorce proceeding if there was any relevant or admissible evidence which he could give; and that where he had evidence which he could give with the aid of his notes as to the proceedings which had taken place between the same parties on the same or very similar issues, there was no reason why he should not be compelled to come and give such evidence. The subpœna against the clerk should be set aside but that against the assistant should stand. Order accordingly.

APPEARANCES: *Rudolph Lyons*, Q.C., and *H. Ognall* (*A. M. Hurwitz* with them) (*Pearlman & Rosen*, Hull); *J. M. McLusky* (*Williamsons*, Hull).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 120

LOCAL GOVERNMENT: REQUISITIONED HOUSES: DUTY TO MAKE PERIODIC REVIEW

Taylor *v.* Munrow (District Auditor)

Lord Parker, C.J., Cassels and Ashworth, JJ.

28th January, 1960

Appeals from a decision of a district auditor.

A local authority, acting under the provisions of the Requisitioned Houses and Housing (Amendment) Act, 1955, from time to time de-requisitioned numerous houses and in respect of many of them made payments to the owners in accordance with s. 4 (4). Such houses became subject to the provisions of the Rent Act, 1957, relating to increase of rent. The local authority were duly notified of and had acceded to many rent increases but they carried out no general review of rents paid by the tenants of their de-requisitioned properties and made no determination under s. 4 (4), with the result that they themselves became liable to make additional payments to the owners. On 9th October, 1957, the local authority resolved "that the council bears the full cost of any increases in rent between the operative date of any valid notices received and the date on which the council is able to make a formal decision," and on 19th March, 1958, they resolved that "... the whole of the valid rent increases under the Rent Act, 1957, in regard to all tenancies of formerly requisitioned properties released to owners under s. 4 of the Requisitioned Houses and Housing (Amendment) Act, 1955, be borne by the council." It appeared that two of their reasons for that decision were that, as it was impossible to give consideration to individual cases without investigating the question of the tenant's income, which they were not prepared to do, the matter should be dealt with as one of policy, and that, as they considered the basis on which the rents of the properties were originally fixed was fair and reasonable, they saw no reason for raising them and were satisfied that by meeting the whole of the increases they would not be placing an unduly heavy burden on the rates. The district auditor considered that the local authority, by omitting to make determinations under s. 4 (4) of the 1955 Act consequent upon the coming into operation of the Rent Act, 1957, or to make such inquiries as might properly and reasonably have justified that omission, acted in a manner which was contrary to law, and had thereby incurred expenditure which he fixed at £200, and which he disallowed and surcharged jointly and severally upon twenty-three members of the council. Six of those members appealed.

LORD PARKER, C.J., said that it was held in *Roberts* v. *Hopwood* [1925] A.C. 578, that where a matter involved the payment of money out of a fund provided by the general body of ratepayers, a local authority must preserve a balance between the duty owed to the general body of ratepayers and that owed to the particular ratepayer in respect of whom the payment was made. If that duty was to be performed, a periodic review was called for under s. 4 (4) of the 1955 Act. The decisions of the local authority were purely arbitrary. Not only the rent but also the general ability or inability of the tenant to pay were relevant considerations in the determination under the section, and the actions of the local authority were inconsistent with the duty they owed to the general body of ratepayers. Accordingly the district auditor was right in finding that the £200 was paid contrary to law and in surcharging the appellants.

CASSELS and ASHWORTH, JJ., agreed. Appeal dismissed.

APPEARANCES: *Ralph Millner* (*Gaster & Turner*); *R. J. Parker* (*Sharpe, Pritchard & Co.*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [1 W.L.R. 151

BASTARDY: DEFENDANT ADJUDGED FATHER OF ILLEGITIMATE CHILD: NO ORDER FOR PAYMENT: WHETHER "AFFILIATION ORDER"

Oldfield *v.* National Assistance Board

Lord Parker, C.J., Cassels and Ashworth, JJ.

4th February, 1960

Case stated by Lancashire justices sitting at Lytham.

On 12th November, 1956, on the hearing of a complaint under s. 3 of the Bastardy Laws Amendment Act, 1872, by a mother alleging that the defendant was the father of her illegitimate child, the justices were informed that the parties had consented to an order being made in favour of the mother on terms that the defendant should pay her £100, and that an order should be made without weekly payments. The justices accordingly adjudged the defendant to be the father of the child and made an order stating "No weekly payment." The defendant duly paid the £100 to the mother with the intention that that payment should release him from all further liability to maintain the child. On 19th January, 1959, and other days, assistance was given under Pt. II of the National Assistance Act, 1948, by reference to the requirements of the child, and on 7th February, 1959, the National Assistance Board applied, pursuant to s. 44 (2) of that Act, for a summons to be served on the defendant under s. 3 of the Bastardy Laws Amendment Act, 1872. The defendant contended, *inter alia*, that the order made on 12th November, 1956, in the proceedings between the mother and himself was an "affiliation order" within s. 44 (2) which barred the subsequent proceedings by the board. The justices considered that they had jurisdiction to hear the board's complaint, and they adjudged the defendant to be the father of the child and ordered him to pay 25s. weekly. The defendant appealed.

LORD PARKER, C.J., said that s. 44 of the National Assistance Act, 1948, was a financial section providing for the collection of money by the National Assistance Board. One would think that "affiliation order" in such a section must mean an order which was more than a mere adjudication of a man as the putative father but which provided for the payment of money. The scheme was that an application could be made if no affiliation order was in force, and by that his lordship thought was meant no order for the payment of money. "Affiliation order" was confined to an order for the payment of money. There was no order for the payment of money made in 1956, and accordingly an application by the board did lie under s. 44 (2). The appeal should be dismissed.

CASSELS and ASHWORTH, JJ., agreed. Appeal dismissed.

APPEARANCES: *David Wild* (*Bower, Cotton & Bower*, for *George Davies & Co.*, Manchester); *J. R. Cumming-Bruce* (*Solicitor, National Assistance Board*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] [2 W.L.R. 423

HABEAS CORPUS: CRIMINAL CAUSE OR MATTER: APPLICATIONS MADE BY PRISONERS: PROCEDURE TO BE FOLLOWED

***In re* Wring: *In re* Cook**

Lord Parker, C.J., and Donovan, J. 9th February, 1960

Applications for writs of habeas corpus.

The applicants, Brian John Wring and Albert Samuel John Cook, both now serving sentences of imprisonment, applied to the Divisional Court in person for writs of habeas corpus. Wring had been sentenced to five years' imprisonment on 25th September, 1958, at Bristol Assizes for shopbreaking, larceny and possessing explosives; Cook to four years' imprisonment on 26th September, 1958, at Somerset Quarter Sessions for false pretences and receiving.

LORD PARKER, C.J., said that there was nothing in the grounds raised by the applicants which would enable the court to make the orders. The position in regard to these applications was as follows. The court did not and could not grant writs of habeas corpus to persons serving sentences passed by courts of competent jurisdiction. Probably the only case in which it would be granted would be if the court were satisfied that the prisoner was being held after the sentence passed on him had expired (*In re Featherstone* (1953), 37 Cr. App. R. 146). A prisoner who wished to challenge his conviction or sentence should apply to the Court of Criminal Appeal or to quarter sessions, as the case might be. If he persisted in his desire to apply for habeas corpus he should either (*a*) consult a solicitor about the possibility of instructing counsel to make an application on his behalf, or (*b*) ask someone to make an application for him or arrange for one to be made, and in either case swear the necessary affidavit, or (*c*) apply to the local committee of The Law Society for legal aid for the purpose of making an application. There was no right of access to the Divisional Court otherwise than by those means. As a concession, the court was prepared to consider any written statement by the prisoner setting out the grounds on which he considered he was unlawfully detained and sent by letter to the Master of the Crown Office. This was not an application as it was not in accordance with the Supreme Court Rules, but the Divisional Court (or in vacation the vacation judge) as a matter of practice considered the letter and statement to see whether the prisoner had an arguable point. If he had, the court arranged for the Official Solicitor to instruct counsel to make a formal application under the rules on the prisoner's behalf. If not, the prisoner was informed that the court saw no reason to depart from the formal procedure, leaving it to him to proceed in accordance with the rules. Prisoners would not be permitted to make such an informal approach more than once. The Divisional Court had ruled that no application for a writ of habeas corpus could be heard in person unless some exceptional ground was shown for departure from established practice: compare *In re Greene* (1941), 57 T.L.R. 533. A prisoner was not therefore produced for the purpose of making an application in person unless the court so directed. The applications were refused.

APPEARANCES: The applicants appeared in person.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law] **[1 W.L.R. 138**

Court of Criminal Appeal

CRIMINAL LAW: BREACH OF PROBATION ORDER: REMAND TO QUARTER SESSIONS: WHETHER CERTIFICATE OF JUSTICES CONCLUSIVE

R. *v.* Chapman

Lord Parker, C.J., Cassels and Ashworth, JJ.

2nd February, 1960

Appeals against convictions.

On 6th February, 1958, the appellants, Oliver George Chapman and James George Pidgley, were convicted of larceny at quarter sessions and put on probation for three years. In July, 1958, they were convicted at a magistrates' court of loitering with intent to steal, and one of the appellants was also convicted of larceny; as a result they were brought before quarter sessions and on 15th July, 1958, the recorder made a new probation order for three years with a condition that they should not associate. They were informed by the recorder that if they met by chance they were not prohibited from conversing. In October, 1959, the appellants were brought before different magistrates' courts, where it was found that they were in breach of the latter probation order in that they had associated. Both appellants were remanded to quarter sessions under s. 6 (4) of the Criminal Justice Act, 1948, the magistrates certifying that the appellants had failed to comply with the requirements of the probation order. At quarter sessions the original offences were put to the appellants, and it was also put to them that they had been found in breach of the probation order by the magistrates' courts. This they admitted. They were not asked whether in fact they had associated and their case throughout was that they had met accidentally. The recorder, taking the view that the findings of the magistrates' courts were conclusive, regarded the appellants as having been committed to him for sentence, and sentenced each of them to twelve months' imprisonment. They appealed on the ground that there had been a mis-trial at quarter sessions.

LORD PARKER, C.J., said that the real question here was whether the certificate which had to be sent forward by the magistrates' court when this procedure was adopted was conclusive so that quarter sessions could not go behind it. In the judgment of the court, it was not conclusive. It was not said to be conclusive but merely admissible. Further, by s. 6 (4) (*b*) of the Act, it was the court of quarter sessions that had to be satisfied that the probationer had failed to comply with the requirements. It was suggested that they could be satisfied that the requirements of the probation order had been fulfilled by looking at the certificate and the certificate alone, but as a matter of construction that was clearly wrong, because para. (*b*) was in the form "where the probationer is brought or appears before the court of assize or quarter sessions, and it is proved to the satisfaction of that court." Paragraph (*a*) had already provided that where the probationer was to appear before quarter sessions there had to be a certificate, and yet the paragraph went on to say that quarter sessions must be satisfied. It was clear from the framework of s. 6 (4), taken as a whole, that Parliament never intended that the certificate of the justices should be final and conclusive. Indeed, looking at the matter from a rather broader angle, if that were right, and the certificate was conclusive, then it would follow that there was no machinery in the nature of appeal from a finding of the magistrate that there had been a breach of probation. It seemed to the court that under para. (*b*) while the certificate was admissible, it was for the court of quarter sessions to be satisfied, and for that purpose they could treat the matter as if it was an appeal from the magistrates, hear further evidence and come to their own conclusion in the matter. It followed that in this case there had been a mis-trial at quarter sessions from the outset. It was just as if a trial had proceeded without prisoners being asked to plead, and in those circumstances it seemed to the court that the proceeding was a nullity, and it would be open to the court to send the matter back for a re-trial. In all the circumstances of the case, however, the sentences would be quashed and the appellants discharged.

APPEARANCES: *F. H. L. Petre* (*Registrar, Court of Criminal Appeal*); *Martin Tucker* (*Woodford & Ackroyd*, Southampton).

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law] **[1 W.L.R. 147**

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(*continued on p. xx*)

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(*continued on p. xxi*)

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IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time :—

Coal Industry Bill [H.C.] [17th February.
Occupiers' Liability (Scotland) Bill [H.C.] [18th February.

Read Second Time :—

City of London (Various Powers) Bill [H.L.] [16th February.
London County Council (General Powers) Bill [H.L.] [16th February.
Southend-on-Sea Corporation Bill [H.L.] [16th February.

Read Third Time :—

Foreign Service Bill [H.L.] [16th February

In Committee:—

Air Corporations Bill [H.L.] [16th February.
Indecency with Children Bill [H.L.] [16th February.
Marriage (Enabling) Bill [H.L.] [18th February.
Public Health Laboratory Service Bill [H.L.] [16th February.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time:—

Civil Aviation (Licensing) Bill [H.C.] [15th February.

To provide for the licensing of certain flying and to repeal section twenty-four of the Air Corporations Act, 1949; and for purposes connected with the matters aforesaid.

Read Second Time:—

Devon Water Bill [H.C.] [16th February.
Distress for Rates Bill [H.L.] [17th February.
European Free Trade Bill [H.C.] [15th February.
First Offenders (Scotland) Bill [H.C.] [19th February.
Iron and Steel (Financial Provisions) Bill [H.C.] [18th February.
War Damage (Clearance Payments) Bill [H.C.] [17th February.

Read Third Time:—

Pawnbrokers Bill [H.C.] [19th February.

B. QUESTIONS

COMPULSORILY ACQUIRED LAND (SALE)

Sir K. JOSEPH said that local authorities were required by law to sell land formerly compulsorily acquired at the best price reasonably obtainable unless they got the Minister of Housing and Local Government's consent to a lower price. Where the sale was to the original owner, he was ready to consider a lower price if the original purchase was made, under compulsory powers, within the last few years. [15th February.

CONSUMER PROTECTION (COMMITTEE)

Mr. REGINALD MAUDLING said that the Committee on Consumer Protection had so far received evidence from fifty-five organisations. [15th February.

GIFTS *Inter Vivos*

Sir E. BOYLE said that in the thirteen years 1946-47 to 1958-59 the estimated average annual receipt of estate duty from dutiable gifts *inter vivos* was £6m. [16th February.

STATUTORY INSTRUMENTS

Bedford (Amendment of Local Enactment) Order, 1959. (S.I. 1960 No. 226.) 5d.
Chepstow (Water Charges) Order, 1960. (S.I. 1960 No. 239.) 4d.
Copyright (International Conventions) (Amendment) Order, 1960. (S.I. 1960 No. 200.) 5d.
Coroners (Fees and Allowances) Rules, 1960. (S.I. 1960 No. 227.) 5d.
Defence (General) (Guernsey) Regulations Continuance Order, 1960. (S.I. 1960 No. 208.) 8d.
Defence (General) Regulations (Isle of Man) Continuance Order, 1960. (S.I. 1960 No. 209.) 6d.
Defence (Jersey) Regulations (Continuance) Order, 1960. (S.I. 1960 No. 210.) 8d.
Dockyard Port of Pembroke Order, 1960. (S.I. 1960 No. 199.) 11d.
Dominica (Constitution) (Amendment) Order in Council, 1960. (S.I. 1960 No. 202.) 4d.
Family Allowances, National Insurance and Industrial Injuries (Denmark) Order, 1960. (S.I. 1960 No. 211.) 10d.
Family Allowances, National Insurance and Industrial Injuries (Finland) Order, 1960. (S.I. 1960 No. 212.) 8d.
General Grants (Health Authorities) (Pooling Arrangements) Regulations, 1960. (S.I. 1960 No. 222.) 5d.
Gwrfai Water Order, 1959. (S.I. 1960 No. 215.) 5d.
Import Duties (Temporary Exemptions) (No. 2) Order, 1960. (S.I. 1960 No. 216.) 5d.
Jurors' Allowances Regulations, 1960. (S.I. 1960 No. 233.) 5d.
Justices' Allowances (Scotland) Amendment Regulations, 1960. (S.I. 1960 No. 219.) 4d.
Kuwait (Amendment) Order, 1960. (S.I. 1960 No. 207.) 5d.
London-Carlisle-Glasgow-Inverness Trunk Road (Wilstead Diversion) Order, 1960. (S.I. 1960 No. 196.) 5d.
Maidstone By-pass Connecting Roads Special Roads Scheme, 1960. (S.I. 1960 No. 197.) 5d.
Maidstone Water Order, 1960. (S.I. 1960 No. 241.) 8d.
Monmouth (Water Charges) Order, 1960. (S.I. 1960 No. 240.) 5d.
Newport and South Monmouthshire Water Board Order, 1959. (S.I. 1960 No. 161.) 2s. 4d.
Nigeria (Constitution) (Amendment) Order in Council, 1960. (S.I. 1960 No. 203.) 7d.
North East Warwickshire Water Board Order, 1960. (S.I. 1960 No. 154.) 1s. 1d.
Northern Rhodesia Order in Council, 1960. (S.I. 1960 No. 204.) 6d.
Patents, etc. (Loan) (Convention) Order, 1960. (S.I. 1960 No. 201.) 4d.
Draft **Shipbuilding and Ship Repairing** Regulations, 1960. 1s. 5d.
Somaliland (Constitution) Order in Council, 1960. (S.I. 1960 No. 205.) 1s.
Southport and District (Water Charges) Order, 1960. (S.I. 1960 No. 190.) 5d.
Stockton-on-Tees (Amendment of Local Enactments) Order, 1959. (S.I. 1960 No. 225.) 5d.
Stopping up of Highways Orders, 1960:—
County of Hampshire (No. 3). (S.I. 1960 No. 186.) 5d.
County of Lancaster (No. 2). (S.I. 1960 No. 229.) 5d.
County of Nottingham (No. 1). (S.I. 1960 No. 187.) 5d.
County of Wilts (No. 2). (S.I. 1960 No. 188.) 5d.
County of York, West Riding (No. 1). (S.I. 1960 No. 230.) 5d.
County of York, West Riding (No. 5). (S.I. 1960 No. 189.) 5d.
Tanganyika (Legislative Council) (Amendment) Order in Council, 1960. (S.I. 1960 No. 206.) 8d.
Tredegar (Water Charges) Order, 1960. (S.I. 1960 No. 195.) 5d.
Wages Regulation (Keg and Drum) Order, 1960. (S.I. 1960 No. 234.) 6d.
Wages Regulation (Paper Bag) Order, 1960. (S.I. 1960 No. 235.) 7d.
Wages Regulation (Retail Bespoke Tailoring) (England and Wales) Order, 1960. (S.I. 1960 No. 185.) 9d.
Wages Regulation (Sugar Confectionery and Food Preserving) Order, 1960. (S.I. 1960 No. 220.) 6d.
Wages Regulation (Sugar Confectionery and Food Preserving) (Holidays) Order, 1960. (S.I. 1960 No. 221.) 7d.
West Cornwall Water Board Order, 1960. (S.I. 1960 No. 155.) 1s.
West Hertfordshire Main Drainage (No. 2) Order, 1959. (S.I. 1960 No. 224.) 5d.
Witnesses' Allowances Regulations, 1960. (S.I. 1960 No. 228.) 5d.

SELECTED APPOINTED DAYS

March
1st Road Traffic Act, 1956, s. 13.

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Will—Farming Business—Authorised Investment—Profits Since Date of Testator's Will Falling to Tenant for Life

Q. *T*, a tenant farmer, died in October, 1957, having by his will appointed *A*, *B*, *C* and *D* executors and trustees and devised and bequeathed to his executors and trustees all his property on trust for sale (with power to postpone sale) and after payment of his debts, etc., to invest the proceeds in trustee securities and to pay the income to *A*, *T*'s widow, during widowhood and thereafter for certain named beneficiaries, and the will contained a declaration that it should be lawful for the trustees to carry on the farm during the widowhood of *A* and in doing so the trustees should be free from the control or interference of any beneficiary under the will and that the trustees should be indemnified in respect of personal liability in connection with the farm. *A*, *B*, *C* and *D* duly proved the will. *A*, *B*, *C* and *D* discontinued the farming business in March, 1959, and over the period from the date of death to discontinuance of the farming business made a profit greater than would have been obtained if the estate had immediately after the date of death been invested in trustee securities. Is any part of this profit to be considered as capital (if so, what proportion) or is *A*, the life tenant, entitled to it all? Where a will contains no provision that rents or other periodical payments falling due or payable subsequently to death in respect of a period elapsed should not be apportionable, is it necessary to apportion them between income and capital?

A. (1) As the farming business is an authorised investment under the will, and as the profits relate to the period since the date of the testator's will, in our view the tenant for life is entitled to the whole profit. (2) This question is in too general terms to allow a specific answer, but we think that it is probable that the tenant for life who was alive at the date of the ascertainment of profit for the period would be entitled to it (see *Re Cox's Trusts* (1878), 9 Ch.D. 159, and *Re Robbins; Midland Bank Executor and Trustee Co., Ltd.* v. *Melville* [1941] 1 Ch. 434).

Administration of Estates—Parties Cohabiting Without Being Lawfully Married—Son and Daughter's Entitlement to Estate—Claim by Father to Part of Estate

Q. About forty years ago, Mr. *X*, a married man, left his wife and went to live with Mrs. *Y*, a widow. Mrs. *Y*'s husband had died a few years previously and there were no children of this marriage. Although Mr. *X* and Mrs. *Y* cohabited together as man and wife, they each retained their names as Mr. *X* and Mrs. *Y*. When submitting his income tax returns Mr. *X* put Mrs. *Y* down as a housekeeper. Two children were born of this liaison, a daughter Mary *Y* (now aged thirty-six) and a son Joseph *Y* (now aged thirty-three). We have not seen any birth certificates and we cannot say at the moment who was put down as the father of these children. Mr. *X* had quite a good position and gave Mrs. *Y* a generous housekeeping allowance, out of which she managed to save quite a considerable sum which she put in the Savings Bank. About ten years ago, it was decided to purchase the dwelling-house where the parties resided, Mrs. *Y* being the sitting tenant. The purchase price was £550, and Mr. *X* paid the deposit of £50. A mortgage from a building society was obtained for £500, the son acting as surety for his mother, who was not working. The deeds are in the name of Mrs. *Y*. During the last three years, Mr. *X* in filling out his income tax forms put down Mrs. *Y* as his wife. Mr. *X*'s legal wife died a number of years ago and there was nothing to prevent Mr. *X* and Mrs. *Y* from marrying during the last few years at least. However, owing to a difference in religion of the parties they decided not to marry but to continue to live together and to keep their individual names. Mrs. *Y* never took the name of Mrs. *X*. Last month, Mrs. *Y* died, intestate. As she was a widow without lawful issue we have advised Miss *Y*, the daughter, that she should take out a grant of letters of administration to her mother's estate, and that only she and her brother are entitled to the estate. However, she is rather worried about the position of her father, Mr. *X*. His son, Joseph *Y*, does not like him, and wishes him to vacate the house. The father thinks that he ought to be entitled to something out of the estate, as he not only paid the deposit of £50 but has made all the mortgage payments to date. Moreover, Mrs. *Y* out of her housekeeping allowance from Mr. *X* managed to save about £800 which is in the bank in her name. Mr. *X* thinks that some of this money should belong to him. We feel, however, that as he was not married to Mrs. *Y*, that for years she was put down as his housekeeper, and that she never openly adopted his name, that he is not entitled to anything at all, and that the deceased's estate must be divided between the children. We accordingly propose to prepare the Inland Revenue affidavit on the basis that the house and money belonged entirely to the deceased and that no part of the estate, even by way of trust, can be said to belong to Mr. *X*, except that as he purchased all the furniture in the house, it can probably be said that the furniture can be excepted from the affidavit. Do you think that our views are correct in this matter? Can the son have his father evicted from the house, if he so wishes?

A. While the question of the validity or otherwise of Mr. *X*'s claims is dependent upon the intention of the parties at the time, we consider that he has a very strong claim to at least a part, if not the whole, of the £800. It seems to us that the housekeeping allowance was handed by Mr. *X* to his housekeeper, Mrs. *Y*, for the purpose of defraying household expenses and, this purpose not having exhausted the whole of the money so paid, Mrs. *Y* held the balance on a resulting trust for Mr. *X*. There is no presumption of advancement where the parties are cohabiting without being lawfully married: *Rider* v. *Kidder* (1806), 12 Ves. 202; *Soar* v. *Foster* (1858), 4 K. & J. 152. As to the house, we think that Mr. *X*'s claim is on a less firm foundation in so far as he was paying indirectly for a roof over his own head. It seems, however, that he could claim a half-interest in the moneys advanced for its purchase: *Moate* v. *Moate* [1948] 2 All E.R. 486; *Re Rogers' Question* [1948] 1 All E.R. 328. We know of no legal or equitable principle which would entitle Mr. *X* to an estate in the house and the personal representatives of the widow can, we think, obtain possession.

Administration of Estates Act, 1925—Date on which an Appropriation of Matrimonial Home to Widow Operates

Q. Mr. *X* was killed in a traffic accident in April, 1958. He died intestate, leaving surviving him a widow and four infant children, the eldest only ten years of age. The net estate is about £6,000. In the Inland Revenue affidavit sworn by the widow, the matrimonial home was valued at £2,500. This was the price paid for the house about four years before, and this value was accepted by the district valuer. There was no valuation by an independent expert valuer. The deceased had carried on two businesses, and these were valued—goodwill, fixtures and fittings—at £2,000 by an accountant and valuer. The widow sold one of the businesses—before administration had actually been granted—for £500, as she was unable to carry on both businesses. Letters of administration were granted to the widow in July, 1958, because at that time she was able to swear that the net value of the estate was under £5,000. Subsequently fresh assets were discovered and application has recently been made by the widow for the appointment of an additional administrator. This application has now been granted. The widow now wishes to have the matrimonial home and the remaining business appropriated to her as part of her £5,000, and the short point on which advice is required is: from what date does an appropriation operate? The widow will give written notice to her co-administrator that she wishes to have the matrimonial home appropriated to her and a simple assent in her favour will be executed by both administrators. Can the value of the house be taken to be £2,500, the value agreed by the district valuer for the Inland Revenue affidavit? If not, and a valuation is made by an expert valuer, what is the position if he should value the house less or more than £2,500, as regards the widow? For example, if a valuer should now value the house, say, at £2,300, is this the value for the appropriation, thus leaving the

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Angmering-on-Sea, Rustington, Worthing and Storrington.—BERNARD TUCKER & SON. Est. 1890. L. B. Tucker, F.R.I.C.S., F.A.I., G. H. E. Evans, F.A.L.P.A., W. J. Brown, F.A.I. Tels. Rustington 1, Worthing 5708/9, Storrington 535.

Arundel and Rustington.—HEASMAN & PARTNERS. Tel. Arundel 2323, Rustington 900.

Bexhill-on-Sea.—JOHN BRAY & SONS (Est. 1864), Estate Agents, Auctioneers and Valuers, 1 Devonshire Square. Tel. 14.

Bexhill-on-Sea and Cooden.—ERNEST SHEATHER, F.A.I., Chartered Auctioneer and Estate Agent, 14 St. Leonards Road. Tel. 350, 351 and 2280.

Bexhill-on-Sea and Little Common.—RICHES & GRAY (Est. 1883), Chartered Auctioneers and Estate Agents, 25 Sea Road, Bexhill-on-Sea. Tel. 34/5. And at 25 Cooden Sea Road, Little Common. Tel. Cooden 2939.

Brighton.—RAYMOND BEAUMONT, F.R.I.C.S., F.A.I., Chartered Surveyors, Chartered Auctioneers and Estate Agents, 35 East Street. Tel. Brighton 20163.

Brighton.—MELLOR & MELLOR, Chartered Auctioneers and Estate Agents, 110 St. James's Street. Tel. 682910.

Brighton.—H. D. S. STILES & CO., F.R.I.C.S., F.A.I. (special rating diploma), 6 Pavilion Buildings. Tel. Brighton 23244 (4 lines). 10 King's Bench Walk, Temple E.C.4. Tel. Central 5356. 3 The Steyne, Worthing. Tel. Worthing 9192/3.

Brighton.—FRANK STONE & PARTNERS, F.A.L.P.A., 84 Queen's Road. Tel. Brighton 29252/3.

Brighton and Hove.—WILLIAM WILLETT, LTD., Auctioneers and Estate Agents, 52 Church Road, Hove. Tel. Hove 34055. London Office, Sloane Square, S.W.1. Tel. Sloane 8141.

Brighton, Hove and Surrounding Districts.—MAURICE P. HATCHWELL, F.R.I.C.S., F.A.I., Chartered Surveyor, Chartered Auctioneer and Estate Agent, 4 Bartholomews, Brighton, 1. Tel. Brighton 23107.

Brighton and Hove and Surrounding Districts.—C. HORTON LEDGER, F.A.I., Established 1885, Chartered Auctioneer and Estate Agent, Surveyor and Valuer, "Sussex House," 126/7 Western Road, Hove, Sussex. Tel. 71291.

Chichester and Bognor Regis.—WHITEHEAD & WHITEHEAD, Chartered Auctioneers and Estate Agents, South Street, Chichester. Tel. 3031 (5 lines). Station Road, Bognor Regis. Tel. 2237/8.

Crawley.—JOHN CHURCHMAN & SONS, Chartered Surveyors, Valuers, Land Agents. Tel. Crawley 1899.

Crawley.—WM. WOOD, SON & GARDNER, Surveyors and Valuers. Tel. Crawley 1.

Crowborough.—DONALD BEALE & CO., Auctioneers, Surveyors and Valuers. The Broadway. Tel. Crowborough 3333.

Eastbourne.—FRANK H. BUDD, LTD., Auctioneers, Surveyors, Valuers, 1 Bolton Road. Tel. 1860.

Eastbourne.—A. C. DRAYCOTT, Chartered Auctioneers and Estate Agents, Estate Offices, Friston Hill, East Dean, Nr. Eastbourne. Tel. East Dean 2277.

Eastbourne.—HEFFORD & HOLMES, F.A.I., Chartered Auctioneers and Estate Agents, 51 Gildredge Road. Tel. Eastbourne 7840.

Eastbourne.—OAKDEN & CO., Estate Agents, Auctioneers and Valuers, 24 Cornfield Road. Est. 1897. Tel. 1234/5.

Eastbourne and District.—FARNHAM & CO., Auctioneers, Estate Agents and Valuers, 6 Terminus Road, Eastbourne. Tel. 4433/4/5. Branch at 87 Eastbourne Road, Lower Willingdon, and 4 Grand Parade, Polegate.

East Grinstead.—Messrs. P. J. MAY (P. J. May and A. L. Apthorp, F.R.I.C.S., F.A.I., M.R.San.I.), 2 London Road. Tel. East Grinstead 315/6.

East Grinstead.—TURNER, RUDGE & TURNER, Chartered Surveyors. Tel. East Grinstead 700/1.

Hassocks and Mid-Sussex.—AYLING & STRUDWICK, Chartered Surveyors. Tel. Hassocks 882/3.

Hastings, St. Leonards and East Sussex.—DYER & OVERTON (H. B. Dyer, D.S.O., F.R.I.C.S., F.A.I.; F. R. Hynard, A.R.I.C.S.), Consultant Chartered Surveyors. Estd. 1892. 6-7 Havelock Road, Hastings. Tel. 5661/2.

Hastings, St. Leonards and East Sussex.—WEST (Godfrey, F.R.I.C.S., F.A.I.) & HICKMAN, Surveyors and Valuers, 50 Havelock Road, Hastings. Tel. 6688/9.

Haywards Heath and District.—DAY & SONS, Auctioneers and Surveyors, 115 South Road. Tel. 1580. And at Brighton and Hove.

Haywards Heath and Mid-Sussex.—BRADLEY AND VAUGHAN, Chartered Auctioneers and Estate Agents. Tel. 91.

Horsham.—KING & CHASEMORE, Chartered Surveyors, Auctioneers, Valuers, Land and Estate Agents. Tel. Horsham 3355 (3 lines).

Horsham.—WELLER & CO., Surveyors, Auctioneers, Valuers, Estate Agents. Tel. Horsham 3311. And at Guildford, Cranleigh and Henfield.

(*continued on p. xxii*)

REGISTER OF

Auctioneers, Valuers, Surveyors, Land and Estate Agents

SUSSEX (*continued*)

Hove.—DAVID E. DOWLING, F.A.L.P.A., Auctioneer, Surveyor, Valuer & Estate Agent. 75, Church Road, Hove. Tel. Hove 37213 (3 lines).
Hove.—PARSONS SON & BASLEY (W. R. De Silva, F.R.I.C.S., F.A.I.), 173 Church Road, Hove. Tel. 34564.
Hove and District.—WHITLOCK & HEAPS, Incorporated Auctioneers, Estate Agents, Surveyors and Valuers, 65 Sackville Road. Tel. Hove 31822.
Hove, Portslade, Southwick.—DEACON & CO., 11 Station Road, Portslade. Tel. Hove 48440.
Lancing.—A. C. DRAYCOTT, Chartered Auctioneers and Estate Agents, 8-14 South Street, Lancing, Sussex. Tel. Lancing 2828.
Lewes and Mid-Sussex.—CLIFFORD DANN, B.Sc., F.R.I.C.S., F.A.I., Fitzroy House, Lewes. Tel. 750. And at Ditchling and Hurstpierpoint.
Seaford.—W. G. F. SWAYNE, F.A.I., Chartered Auctioneer and Estate Agent, Surveyor and Valuer, 3 Clinton Place. Tel. 2144.
Storrington, Pulborough and Billinghurst.—WHITEHEAD & WHITEHEAD amal. with D. Ross & Son, The Square, Storrington (Tel. 40), Swan Corner, Pulborough (Tel. 232/3), High Street, Billinghurst (Tel. 391).
Sussex and Adjoining Counties.—JARVIS & CO., Haywards Heath. Tel. 700 (3 lines).
West Worthing and Goring-by-Sea.—GLOVER & CARTER, F.A.L.P.A., 110 George V Avenue, West Worthing. Tel. 8686/7. And at 6 Montague Place, Worthing. Tel. 6264/5.
Worthing.—A. C. DRAYCOTT, Chartered Auctioneers and Estate Agents, 8-14 South Street, Lancing, Sussex. Tel. Lancing 2828.
Worthing.—EYDMANN, STREET & BRIDGE (Est. 1864). 14 Chapel Road. Tel. 4060.
Worthing.—HAWKER & CO., Chartered Surveyors, Chapel Road, Worthing. Tel. Worthing 1136 and 1137.
Worthing.—Patching & Co., Est. over a century. Tel. 5000. 5 Chapel Road.
Worthing.—JOHN D. SYMONDS & CO., Chartered Surveyors, Revenue Buildings, Chapel Road. Tel. Worthing 623/4.

WARWICKSHIRE

Birmingham and District.—SHAW, GILBERT & CO., F.A.I., "Newton Chambers," 43 Cannon Street, Birmingham, 2. Midland 4784 (4 lines).

WARWICKSHIRE (*continued*)

Coventry.—GEORGE LOVEITT & SONS (Est. 1843), Auctioneers, Valuers and Estate Agents, 29 Warwick Row. Tel. 3081/2/3/4.
Coventry.—CHAS. B. ODELL & CO. (Est. 1901) Auctioneers, Surveyors, Valuers and Estate Agents, 53 Hertford Street. Tel. 22037 (4 lines).
Leamington Spa and District.—TRUSLOVE & HARRIS, Auctioneers, Valuers, Surveyors. Head Office: 38/40 Warwick Street, Leamington Spa. Tel. 1861 (2 lines).
Rugby and District.—WIGGINS & RUSSELL, Auctioneers, etc., 14 Regent Place, Rugby (Tel. 2548).
Sutton Coldfield.—QUANTRILL SMITH & CO., 4 and 6 High Street. Tel. SUT 4481 (5 lines).

WESTMORLAND

Kendal.—MICHAEL C. L. HODGSON, Auctioneers and Valuers, 10a Highgate. Tel. 1375.
Windermere.—PROCTER & BIRKBECK (Est. 1841), Auctioneers, Lake Road. Tel. 688.

WILTSHIRE

Bath and District and Surrounding Counties.—COWARD, JAMES & CO., incorporating FORTT, HATT & BILLINGS (Est. 1903), Surveyors, Auctioneers and Estate Agents, Special Probate Department. New Bond Street Chambers. 14 New Bond Street, Bath. Tel. Bath 3150, 3584, 4268 and 61360.
Marlborough Area (Wilts, Berks and Hants Borders).—JOHN GERMAN & SON (Est. 1840), Land Agents, Surveyors, Auctioneers and Valuers, Estate Offices, Ramsbury, Nr. Marlborough. Tel. Ramsbury 361/2. And at Ashby-de-la-Zouch, Burton-on-Trent and Derby

WORCESTERSHIRE

Kidderminster.—CATTELL & YOUNG, 31 Worcester Street. Tel. 3075 and 3077. And also at Droitwich Spa and Tenbury Wells.
Worcester.—BENTLEY, HOBBS & MYTTON, F.A.I., Chartered Auctioneers, etc., 49 Foregate Street, Tel. 5194/5.

YORKSHIRE

Bradford.—NORMAN R. GEE & PARTNERS, F.A.I., 72/74 Market Street, Chartered Auctioneers and Estate Agents. Tel. 27202 (2 lines). And at Keighley.

YORKSHIRE (*continued*)

Bradford.—DAVID WATERHOUSE & NEPHEWS, F.A.I., Britannia House, Chartered Auctioneers and Estate Agents. Est. 1844. Tel. 22622 (3 lines).
Hull.—EXLEY & SON, F.A.L.P.A. (Incorporating Officer and Field), Valuers, Estate Agents, 70 George Street. Tel. 33991/2.
Leeds.—SPENCER, SON & GILPIN, Chartered Surveyor, 2 Wormald Row, Leeds, 2. Tel. 3-0171/2.
Scarborough.—EDWARD HARLAND & SONS, 4 Aberdeen Walk, Scarborough. Tel. 834.
Sheffield.—HENRY SPENCER & SONS, Auctioneers, 4 Paradise Street, Sheffield. Tel. 25206. And at 20 The Square, Retford, Notts. Tel. 531/2. And 91 Bridge Street, Worksop. Tel. 2654.

SOUTH WALES

Cardiff.—DONALD ANSTEE & CO., Chartered Surveyors, Auctioneers and Estate Agents, 91 St. Mary Street. Tel. 30429.
Cardiff.—S. HERN & CRABTREE, Auctioneers and Valuers. Established over a century. 93 St. Mary Street. Tel. 29383.
Cardiff.—J. T. SAUNDERS & SON, Chartered Auctioneers & Estate Agents. Est. 1895. 16 Dumfries Place, Cardiff. Tel. 20234/5, and Windsor Chambers, Penarth. Tel. 22.
Cardiff.—JNO. OLIVER WATKINS & FRANCIS, Chartered Auctioneers, Chartered Surveyors, 11 Dumfries Place. Tel. 33489/90.
Swansea.—E. NOEL HUSBANDS, F.A.I., 139 Walter Road. Tel. 57801.
Swansea.—ASTLEY SAMUEL, LEEDER & SON (Est. 1863), Chartered Surveyors, Estate Agents and Auctioneers, 49 Mansel Street, Swansea. Tel. 55891 (4 lines).

NORTH WALES

Denbighshire and Flintshire.—HARPER WEBB & CO., (incorporating W. H. Nightingale & Son), Chartered Surveyors, 35 White Friars, Chester. Tel. 20685.
Wrexham, North Wales and Border Counties.—A. KENT JONES & CO., F.A.I., Chartered Auctioneers and Estate Agents, Surveyors and Valuers. The Estate Offices, 43 Regent Street, Wrexham. Tel. 3483/4.
Wrexham, North Wales and Ellesmere, Shropshire.—WINGETT & SON, Chester Street, Wrexham. Tel. 2050.

widow a larger balance towards her £5,000? Is it correct that the appropriation will operate from the date of the assent, so that all outgoings in respect of the house will fall on the estate of the deceased up to the date of the assent, and not on the widow? Similarly, as regards the business, it is considered that there need be no written assent or appropriation in respect of this. The widow has been carrying on the business from the date of death of her husband. Can it be taken that she has already appropriated the business in her favour, or is any other action necessary? Since the widow has carried on the business it is probable that it has deteriorated in value. Can the widow have the business appropriated to her, say, as from this week and at the present valuation which will be a lot less than £2,000? Or will the appropriation operate as from the date of death?

A. (1) In making the appropriation of the house to the widow the representatives must have regard to the requirements of the Administration of Estates Act, 1925, s. 41 (Intestates' Estates Act, 1952, Sched. II; Emmet on Title, 14th ed., vol. 2, p. 437). One of these requirements is that they may fix the value as they think fit but must employ a qualified valuer where that is necessary (Administration of Estates Act, 1925, s. 41 (3); Emmet, op. cit., p. 461). In this instance, as the widow is one of the representatives and infants are interested, we think a valuer should be employed. (2) The valuation must be made as at the time of appropriation (*Re Charteris* [1917] 2 Ch. 379). The alternative would be to sell the asset and the estate would then receive a price which might be more or less than the value on the date of death; appropriation is intended to be at a similar figure. (3) In general, appropriation will operate as from the date of the assent. It may be, of course, that the widow previously occupied the house and should be debited with an appropriate sum, e.g., as set off against any interest due to her. (4) No written assent is essential as respects the business, but in view of the fiduciary capacity of the widow, we think careful expert valuation is essential and a deed of appropriation would be advisable. If the business has deteriorated in value since death, the widow may be subject to question as to whether, in the interests of the children, she should have disposed of it at once. In any case it must be borne in mind that the widow is in a fiduciary capacity, being, in effect, one of the vendors and the purchaser, and so she must, if the transaction is to be upheld on later challenge by a child, be able to prove the utmost good faith.

NOTES AND NEWS

PERFORMING RIGHT TRIBUNAL: COPYRIGHT MUSIC

To-day's *Board of Trade Journal* includes the following short particulars of the decision in a dispute with the Performing Right Society referred to it by the Scottish Ballroom Association.

Before 1948, the sum payable to the Performing Right Society by the proprietors of commercial dance halls for an open licence to have copyright music included in their band programmes for performance at public dances was computed, from time to time, in various ways. Neither party being satisfied with this rather arbitrary way of dealing with the problem of fixing a licence fee, negotiations were begun in 1948 between the Scottish Ballroom Association and the Performing Right Society. In the result, an agreement was reached whereby the dance halls were to be granted a licence on terms of paying an annual sum calculated at 1 per cent. on a basic figure. That figure was arrived at on a formula which consisted of multiplying for each dance session the price of admission by one-half of the number of persons capacity. The terms "price of admission" and "number of persons capacity" were strictly defined. When this formula had been in operation about eight years, the Performing Right Society reverted to the proposal for which it had originally contended in 1948, and introduced a new scheme whereby the fee was to be a sum calculated as 2 per cent. of the actual gross takings from admission charges for dancing, to be certified by an independent practising accountant. The Scottish Ballroom Association challenged the propriety of that scheme by referring the matter to the Performing Right Tribunal. In so doing, they were supported by an English body known as the Association of Ballrooms, Ltd., and by another Scottish body called the North British Ballrooms Association. These bodies together represented about 160 dance halls out of a total number of some 440 dance halls in the whole of Great Britain. The respective merits of the formula and the new scheme were fully canvassed during a lengthy hearing before the tribunal, and the problem resolved itself into two main issues: what should be the proper method of arriving at the basic figure; and what should be the proper percentage of that figure to be paid as the licence fee. In the result, the tribunal came to the conclusion that the value of so intangible a commodity as a general right to perform copyright music in public emerged from the coming together on equal terms of a willing buyer and a willing seller. The formula arrived at in 1949 was regarded as being of that character, and it was accordingly upheld as representing the proper method of arriving at the basic figure. On the other hand, as regards the proper percentage, the tribunal considered that there had been since 1949 a rise in costs in general which, although reflected to some extent in the constituent figures of the formula, was still not adequately covered by the original 1 per cent. The rate was therefore increased to a net figure of 1·6 per cent. Nevertheless, in order to meet the contingency of a possible over-estimate, the tribunal granted to any individual dance-hall proprietor the option, on giving due notice to the Performing Right Society, to pay a licence fee subject to a discount for prompt payment and calculated at the rate of 1·5 per cent. on his actual gross takings from admission charges for dancing. Subject again to proper notice being given, the exercise of that option was to be revocable. The tribunal accordingly varied the new scheme put forward by the Performing Right Society (which was the subject-matter of the reference) by substituting, as from 4th May, 1959, the method of computation which it approved for that which had been proposed by the Performing Right Society. The date was that on which the decision of the tribunal was given; but the new scheme in its original form was never put into operation. This was due to an agreement between the parties, whereby effect was not to be given to the new scheme pending the decision of the tribunal.

ADMISSION AS SOLICITOR IN SCOTLAND

The text has become available of the Admission as Solicitor (Scotland) Regulations, 1960, which the Council of the Law Society of Scotland, subject to the consent of the Lord President, have decided to make in pursuance of s. 1 of the Solicitors (Scotland) Act, 1958. The regulations will come into force on 1st October, 1960, and will govern the conditions for admission as a solicitor in Scotland. Full particulars of the regulations are published in the *Journal of the Law Society of Scotland*, February, 1960. The following extracts from the regulations are of particular interest to English solicitors:—

PART III—EXAMINATIONS

18. (1) The Council may if they think fit in the case of an intrant who has passed the Trust Accounts and Book-keeping portion of the Intermediate Examination under the Articled Clerks Regulations, 1957, made by the Law Society in England, issue to him a certificate of exemption from the Professional Examination in Book-keeping and Accounting.

FIRST SCHEDULE

Provisions with respect to duration of apprenticeship

(2) In the case of an intrant who, before entering into apprenticeship, has been called to the Bar in England or Northern Ireland or has been admitted and enrolled as a solicitor in England or Northern Ireland, the term shall be three years.

THE LAW SOCIETY: VISIT TO NEW YORK

Sir Thomas Lund, secretary of The Law Society, flew to New York and Chicago on 16th February to make final arrangements for more than 1,000 members of the society and their families to visit Washington in August for the American Bar Association meeting.

DEVELOPMENT PLANS

PROPOSALS FOR ALTERATIONS OR ADDITIONS SUBMITTED TO MINISTER

Title of plan	Districts affected	Date of notice	Last date before which written objections or representations may be made
Eastbourne County Borough Council	Area of the council	19th January, 1960	9th March, 1960
Leicester City Council	Area of the council	2nd February, 1960	29th March, 1960
London County Council	Camberwell, Lambeth, Southwark and Stepney Boroughs	10th February, 1960	29th March, 1960
Middlesex County Council	Heston and Isleworth Borough	25th January, 1960	12th March, 1960
County Borough of Oldham	Area of the council	14th January, 1960	29th February, 1960
Warwickshire County Council	Solihull Borough	29th January, 1960	19th March, 1960

AMENDMENTS BY MINISTER

Title of plan	Districts affected	Date of notice	Last date for applications to High Court
County Borough of Bolton	Area of the council	12th February, 1960	6 weeks from 12th February, 1960
Buckinghamshire County Council	Buckingham and part of Slough Boroughs; Eton, Newport Pagnell and Wolverton Urban Districts; Amersham, Buckingham, part of Eton, Newport Pagnell and Wycombe Rural Districts	5th February, 1960	6 weeks from 5th February, 1960
Cornwall County Council	Falmouth and St. Ives Boroughs	8th February, 1960	6 weeks from 13th February, 1960
Isle of Wight County Council	Area of the council	27th January, 1960	6 weeks from 29th January, 1960
Tynemouth County Borough Council	Area of the council	19th February, 1960	6 weeks from 19th February, 1960

THE SOLICITORS ACT, 1957

On 16th December, 1959, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of HEDLEY ARTHUR SEVILLE, of Arcade Chambers, Belvoir Road, Coalville, Leicester, and of No. 3 Granby Street, Leicester, be struck off the Roll of Solicitors of the Supreme Court and that he do pay to the complainant his costs of and incidental to the application and inquiry. An appeal having been dismissed, the order came into effect on 8th February.

On 16th December, 1959, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that ALFRED HURNER, of No. 120 Long Acre, Covent Garden, London, W.C.2, be suspended from practice as a solicitor for a period of two years and that he do pay to the complainant his costs of and incidental to the application and inquiry. Notice of appeal having been given and withdrawn, the order came into effect on 9th February.

COLONIAL LEGAL APPOINTMENTS

The following promotions and appointments are announced in the Colonial Legal Service: Mr. O. M. BROWNE, Crown Attorney, British Virgin Islands, to be Crown Counsel, Barbados; Mr. G. K. POLLOCK to be Resident Magistrate, Northern Rhodesia; Mr. B. O'R. ROGERS to be Magistrate, Somaliland; and Mr. J. P. TRAINOR, Justice of the Special Court, Cyprus, to be Judicial Commissioner, New Hebrides.

Honours and Appointments

Mr. KENNETH WILLIAMS, solicitor, of Nottingham, has been appointed deputy town clerk of Wolverhampton in succession to Mr. A. H. M. Smyth, who has been appointed deputy clerk of Hampshire County Council. He will take up his appointment on 1st April.

Mr. GEOFFREY ARTHUR JOHN SMALLWOOD, barrister-at-law, has been appointed a Stipendiary Magistrate for the Staffordshire Potteries.

Personal Note

A business association with Friar Street, Reading, Berks, extending over almost eighty years will cease with the removal of Messrs. Brain & Brain, solicitors, to new offices at 73 London Street, Reading.

PRINCIPAL ARTICLES APPEARING IN VOL. 104

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

"Insanity" Defined

Sir,—Your correspondent's definition of insanity would seem to include everybody. While this may possibly be correct, it is hardly workable. Who speaks and acts rationally all the time? Who wants to? If the reasonable man is only a hypothetical figure, the rational man could be a hypothetical horror.

London, E.C.4. "OLD NICK."

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: Oyez House, Breams Buildings, Fetter Lane, London, E.C.4. Telephone: CHAncery 6855.

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Classified Advertisements must be received by first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).

Classified Advertisements

PUBLIC NOTICES—INFORMATION REQUIRED—CHANGE OF NAME
3s. per line as printed

APPOINTMENTS VACANT—APPOINTMENTS WANTED—PRACTICES AND PARTNERSHIPS and all other headings
12s. for 30 words. Additional lines **2s.** Box Registration Fee **1s. 6d.** extra

Advertisements should be received by first post Wednesday for inclusion in the issue of the same week and should be addressed to
THE ADVERTISEMENT MANAGER, OYEZ HOUSE, BREAMS BUILDINGS, FETTER LANE, E.C.4. CHAncery 6855

PUBLIC NOTICES

DERBYSHIRE COUNTY COUNCIL

Applications invited for appointment of ASSISTANT PROSECUTING SOLICITOR. Experience in advocacy is essential. Salary J.N.C. "A" (£1,245–£1,420 p.a.). Applications, on forms from the undersigned, returnable by 14th March.

D. G. GILMAN,
Clerk of the County Council.

County Offices,
Matlock.

COUNTY OF ESSEX

APPOINTMENT OF
ASSISTANT SOLICITORS

Applications are invited from Solicitors—

(1) with experience of advocacy: the person appointed will be required to conduct prosecutions in the Magistrates' Courts of the County on behalf of the Police and the County Council; he must also be able to draft briefs and instruct counsel at Quarter Sessions and Assizes;

(2) with knowledge of conveyancing, but duties will probably not consist wholly of conveyancing; knowledge of local government law an advantage but not essential.

Salary in accordance with qualifications and experience but will not exceed for post (1) £1,620 a year, and for post (2) £1,165; posts superannuable; medical examination. Canvassing forbidden. Applications stating age, education, qualifications and experience, the post applied for and names and addresses of three referees, should be sent as soon as possible to County Clerk, County Hall, Chelmsford.

METROPOLITAN MAGISTRATES' COURTS

Metropolitan Magistrates' Courts require barrister or solicitor for pensionable post of CLERK. Both men and women may apply. Age limits 25 to 40 inclusive on 1st March, 1960. Commencing salary (male) £930–£1,065 according to age. On completion of probation (normally one year) and subject to satisfactory service successful applicant would be regraded Deputy Chief Clerk, salary scale (male) £1,265–£1,795. Prospects of future promotion to Chief Clerk, salary scale (male) £2,260–£2,595. Female salary scale at present slightly less than male scale. Applications, giving age, qualifications, experience and names of two referees by 12th March, 1960, to Senior Chief Clerk, Bow Street Magistrates' Court, W.C.2, from whom further particulars may be obtained.

BOROUGH OF KING'S LYNN

LAW CLERK

Law Clerk required with experience of conveyancing. Salary A.P.T. II (£765–£880) per annum. Post superannuable. Applications with names and addresses of two referees, to be delivered to the undersigned, by 14th March, 1960.

E. W. GOCHER,
Town Clerk.

Town Hall,
King's Lynn.

CORPORATION OF MANCHESTER

MANCHESTER TOWN CLERK'S DEPARTMENT

Applications are invited for—

(1) CONVEYANCING ASSISTANT, salary £765–£880. Applicants should be fully experienced in general conveyancing work, including chief rents.

(2) CONVEYANCING ASSISTANT, salary £610–£765. Applicants should have some experience of conveyancing work.

Previous Local Government service is not necessary. Applications giving particulars of age, education, qualifications and experience should be sent to the Town Clerk, Town Hall, Manchester, 2, by 4th March, 1960.

COUNTY BOROUGH OF GRIMSBY

SECOND ASSISTANT SOLICITOR

Applications are invited for this appointment which offers an excellent opportunity to acquire a wide experience of Local Government in an expanding and progressive port and county borough. Duties include advocacy, conveyancing, committee and other general legal and administrative work.

Salary A.P.T. V (£1,220–£1,375), N.J.C. Conditions of Service apply. Previous experience in Local Government not essential. Canvassing will disqualify.

Application forms, with particulars of three referees, are obtainable from me and must be returned by the 4th March.

F. W. WARD,
Town Clerk.

Municipal Offices,
Grimsby.

COUNTY OF ESSEX

Competent conveyancing clerk required. Some supervision. Salary according to qualifications and experience but will not exceed £880 a year. Five-day week of 38 hours; sick pay; superannuation; canteen; holiday—18 working days, plus 3 days after ten years service. Canvassing forbidden. Applications in own handwriting, stating age, education, qualifications, experience and names and addresses of three referees, should be sent as soon as possible to County Clerk, County Hall, Chelmsford.

CITY OF YORK

JUNIOR ASSISTANT SOLICITOR

Applications are invited for this appointment from Solicitors with experience in conveyancing. A knowledge of advocacy desirable. Salary on Special Classes Grade (£835–£1,165); commencing salary according to ability and experience.

Applications, with the names of two referees, to be forwarded to the Town Clerk, Guildhall, York, on or before 14th March, 1960.

APPOINTMENTS VACANT

YOUNG energetic Solicitor as assistant in busy general practice; small country town, Kent near Sussex border and coast: excellent progressive salary for man with ability and initiative: write full particulars.—Box 6370, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

LEGAL APPOINTMENT
SOLICITOR—BARRISTER

RAPIDLY EXPANDING INTERNATIONAL ORGANISATION is looking for a young SOLICITOR or BARRISTER to organise and head European Division Legal Department with direct responsibility to Divisional Management.

Applicants should have some years' experience in Commercial and Common Law Practice and considerable drive and capacity for work with a view eventually to assuming wider responsibilities. Knowledge of French and/or German an advantage.

Following three months with the Parent Company in New York, the successful applicant would be employed in the Divisional Head Offices in South London. Remuneration and other benefits would be negotiated on an attractive basis. Pension and life assurance benefits available.

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BRIGHTON Solicitors have a vacancy for an experienced Conveyancing and Probate Clerk. Minimum supervision and permanent post. Salary up to £1,000 for suitable applicant. Write with particulars.—Box 6371, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

SOLICITORS in Brighton need an Assistant Solicitor. General family practice, with prospects for a young Solicitor prepared to work hard. Write with details of experience, age, etc.—Box 6372, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

A CLERK, MANAGING OR EQUIVALENT, with Litigation, County Court or similar experience and also commercial experience, required by Finance House in North London for active participation in the legal work of the Company. Salary £750 to £900.—Box 6392, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

FIRST-CLASS litigation managing clerk required by West End Solicitors. Applicants must have sound experience of all branches (except Admiralty) and must be prepared to work hard and without supervision. Commencing salary £1,200 per annum. Excellent prospects of advancement.—Box 6336, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

continued on p. xxiv

★ Classified Advertisements ★

continued from p. xxiii

APPOINTMENTS VACANT—*continued*

EXPERIENCED partner required by West End Solicitors. Share at least £3,000 per annum. Capital required.—Box 6335, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

REIGATE-SURREY.—Old-established firm require immediately Managing Clerk for Conveyancing and Probate; please write stating age, qualifications, experience and salary required.—Box 6207, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

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CONVEYANCING Clerk required by City Solicitors. Hours 10 a.m. to 5.30 p.m. No Saturdays.—Apply, giving age and experience and salary required to Box 6349, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

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YOUNG Solicitor required for London Suburban Conveyancing practice—must be hard worker and capable of acting independently—good prospects of partnership.—Box 6354, Solicitors' Journal, Oyez House, Breams Buildings, E.C.4.

OLD-ESTABLISHED Manchester Solicitors require admitted or unadmitted Conveyancing Assistant. Responsible position with good prospects.—Box 6357, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

CONVEYANCING Managing Clerk, admitted or unadmitted, required for London South West Suburb—good prospects for advancement for keen and hard worker—please state age, experience and salary required.—Box 6355, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

LUTON.—London Solicitors opening branch office require energetic and able Conveyancing Assistant, admitted or unadmitted, to take full charge as soon as possible. Immense scope and prospects.—Box 6387, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

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ASSISTANT Solicitor required for general practice in North Midlands town.—Box 6398, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

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SENIOR Common Law Clerk to take charge West End department, urgently required; specialised knowledge insurance claims desirable; good salary; also REQUIRED Conveyancing and General Senior Clerk for branch office near Ilford.—Full details in each case, please, to Box 6408, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

continued on p. xxv

Classified Advertisements

continued from p. xxiv

APPOINTMENTS VACANT—*continued*

ASSISTANT Solicitor required for busy London Practice; first class partnership prospects; good commencing salary.—Write Box 6407, Solicitors' Journal, Oyez House, Breams Buildings, Fetter Lane, E.C.4.

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continued on p. xxvi

★ Classified Advertisements ★

continued from p. xxv

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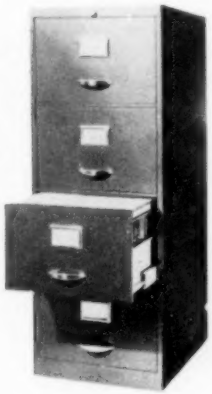

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